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**WAIVER OF  
MORAL RIGHTS  
IN VISUAL ARTWORKS**

**MARCH 1, 1996**

**FINAL REPORT OF THE  
REGISTER OF COPYRIGHTS**





The Register of Copyrights  
of the  
United States of America

Library of Congress  
Department 17  
Washington, D.C. 20540

March 1, 1996

(202) 707-8350

Dear Mr. President:

I am pleased to present the report on the effect of the waiver provisions of the Visual Artists' Rights Act of 1990, which in a new Section 106A gives to artists of certain works the rights of attribution, integrity, and where the work of art is one of recognized stature, the right to prevent its destruction.

Our study included gathering information about the use and effect of the waiver provisions at a public hearing as well as from an extensive survey. This report reflects our findings and recommendations, which unfortunately, because of the lack of knowledge of the waiver provisions by artists and purchasers, as well as landlords of buildings, are somewhat inconclusive.

Respectfully,

A handwritten signature in black ink that reads 'Marybeth Peters'.

Marybeth Peters  
Register of Copyrights

The Honorable Albert Gore, Jr.  
President of the Senate  
S212, U.S. Capitol  
Washington, D.C. 20510

\* \* \* \* \*

17 USC 106A  
note.

**SEC. 608. STUDIES BY COPYRIGHT OFFICE.**

**(a) STUDY ON WAIVER OF RIGHTS PROVISION.—**

**(1) STUDY.—**The Register of Copyrights shall conduct a study on the extent to which rights conferred by subsection (a) of section 106A of title 17, United States Code, have been waived under subsection (e)(1) of such section.

**(2) REPORT TO CONGRESS.—**Not later than 2 years after the date of the enactment of this Act, the Register of Copyrights shall submit to the Congress a report on the progress of the study conducted under paragraph (1). Not later than 5 years after such date of enactment, the Register of Copyrights shall submit to the Congress a final report on the results of the study conducted under paragraph (1), and any recommendations that the Register may have as a result of the study.



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Sincerely,

A handwritten signature in cursive script that reads 'Marybeth Peters'.

Marybeth Peters  
Register of Copyrights

The Honorable Newt Gingrich  
Speaker of the House of Representatives  
2428 Rayburn House Office Building  
Washington, D.C. 20515-1006

\* \* \* \* \*

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# **Waiver of Moral Rights In Visual Artworks**

## **EXECUTIVE SUMMARY**

### **Introduction**

The Visual Artists Rights Act of 1990 (VARA) directed the Copyright Office to conduct a study to assess for Congress the impact of the waiver of moral rights provisions contained in that legislation. On December 1, 1992, the Copyright Office submitted to Congress an Interim Report summarizing responses to a Notice of Inquiry and outlining further inquiries and avenues of research it would undertake. This final report represents the completed Office study.

### **I. THE VISUAL ARTISTS RIGHTS ACT OF 1990**

In 1990, Congress for the first time legislated limited moral rights of attribution and integrity to authors of narrowly defined works of visual arts. These rights, which follow the rights specified in Article 6bis of in the international Berne Convention for the Protection of Literary and Artistic Works, mirror rights granted to authors by most nations of the world. They guarantee to authors of so-called fine arts and exhibition photographs the right to claim or disclaim authorship in a work; limited rights to prevent distortion, mutilation, or modification of a work; and the right, under some circumstances, to prevent destruction of a work that is incorporated into a building.

After hearing testimony from artists' representatives, commercial users and other interested parties, Congress determined that artists' moral rights should not be absolute, but should be tempered by commercial realities, provided that authors were not unduly influenced

to give away their new-found rights. Thus, the legislation provides for waiver of these moral rights, but only by a signed, written agreement specifying the work and the uses of the work to which a waiver applies. Congress further directed the Copyright Office to review the waiver provision's operation to assure that artists were not coerced by unequal bargaining power to forfeit their moral rights.

An early step in the Office's research was to review which state statutes afford moral rights protection. The Office found that nine states had enacted legislation before VARA to protect, to varying degrees, artists' moral rights. Those following a so-called preservation model protect an artist's rights of attribution and integrity and generally protect artistic works against unauthorized destruction. The second model does not protect against destruction but does ensure an artist's rights of attribution and integrity in a class of works that is sometimes limited to visual or graphic works of recognized quality. A tenth state's law, enacted after VARA, follows a third model that protects against alteration or destruction and ensures proper attribution but applies only to works publicly displayed in state buildings. The extent to which state and common law moral rights protection will survive the federal Copyright Act's preemption provisions is unclear.

Moral rights are also protected indirectly by state tort, privacy, and publicity laws; by the federal protection of the Lanham Act; and by the Copyright Act's protection of an author's exclusive rights in his or her derivative works, including limits on a statutory licensee's rights to arrange an author's musical composition for use in phonorecords.

## II. MORAL RIGHTS IN OTHER COUNTRIES

Nations that provide their authors and artists with protection in the nature of moral rights protection do so using various approaches. Some use statutory law to balance the interests of artists and their creations with the interests of copyright owners and other users of works. The statutes may be categorized as laws of copyright, design rights, passing-off, unfair competition, tort, or contract. In other countries, the personal rights of attribution or paternity, and integrity, have been defined and shaped by the courts.

Nations that are members of the Berne Convention for the Protection of Literary and Artistic Works are required to meet a minimum level of protection, as set forth in the Berne Convention's Article 6**bis**. The multilateral treaty does not address waiver of moral rights; waiver is neither sanctioned nor prohibited, and individual member nations may implement the Berne Convention in their own ways.

However, since the inception of the Berne Convention, member nations have had intense interest in supporting not only authors' rights to exploit their works for profit, but also in preserving authors' personal relationships with their works. In Chapter II of this Report, the Copyright Office briefly discusses the evolution of Article 6**bis**.

The Office surveyed a sampling of 14 nations and the European Community, selected to represent countries with civil and common law traditions. Of the countries selected, twelve belonged to the Berne Convention when we began the study and two, Singapore and Nigeria, did not. Since that time Nigeria has joined. The Copyright Office examined legislation and case law to determine how and to what extent different nations protect authors' moral rights.

Nations, which follow the civil law tradition, such as France provide broad protection for authors and their creations. In countries such as the United Kingdom, which follows the common law tradition, the artist relies more on contract law than copyright law for moral rights protection.

Examination of the evolution of Berne's Article 6bis, together with a survey of legal protection of authors' moral rights worldwide, provided the Office with a perspective to view moral rights provisions in United States law with the goal of informing Congress whether or not the Visual Artists Rights Act of 1990 is fulfilling the United States' treaty obligations, and whether or not the waiver provisions of 17 U.S.C. §106A are fulfilling Congress' intent in passing that legislation.

### **III. MORAL RIGHTS IN UNITED STATES CASE LAW**

This chapter first summarizes significant federal case law that assessed moral rights prior to enactment of the Visual Artists Rights Act, and then summarizes judicial decisions rendered since enactment of VARA.

Although moral rights were not recognized in U.S. copyright law prior to enactment of VARA, some state legislatures had enacted moral rights laws, and a number of judicial decisions accorded some moral rights protection under theories of copyright, unfair competition, defamation, invasion of privacy, and breach of contract. Such cases have continued relevance, not only for historical interest, but also for precedential value because state and common law moral rights protection was not entirely preempted by VARA. Arguably, state laws of defamation, invasion of privacy, contracts, and unfair competition by "passing off" are not

preempted. Further, VARA rights endure only for the artist's life, after which preemption ceases.

In Vargas v. Esquire, artist Antonio Vargas created for Esquire magazine a series of calendar girl illustrations, some of which were published without his signature or credit-line. The U.S. Court of Appeals for the Seventh Circuit ruled that the rights of the parties were determined by the contract in which Vargas agreed as independent contractor to furnish pictures and granted all rights in the artwork to Esquire. The court rejected theories of implied contract, moral rights, and unfair competition. In Granz v. Harris, a jazz concert was re-recorded with a reduced playing time and content, such that a full eight minutes was omitted. The contract required the defendant to use a credit-line attributing the plaintiff-producer, who sued. The Second Circuit considered whether, by contract or by tort, the plaintiff could prevent publication "as his, of a garbled version of his uncopyrighted product," and decided that selling abbreviated recordings with the original credit line constituted unfair competition and breach of contract. In Gilliam v. American Broadcasting Cos., ABC broadcast the first of two 90-minute specials, consisting of three 30-minute Monty Python shows each, but cut 24 of the original 90 minutes. Monty Python sued for an injunction and damages. The Second Circuit ruled that ABC's actions contravened contractual provisions limiting the right to edit the program and that a licensee's unauthorized use of an underlying work by publication in a truncated version was a copyright infringement. In a theory akin to moral rights, the court said that a distorted version of a writer's or performer's work may violate rights protected by the Lanham Act and may present a cause of action under that statute. The concurrence cautioned against employing the Lanham

Act as a substitute for moral rights, and believed the court should restrict its opinion to contract and copyright issues. Another case, Wojnarowicz v. American Family Association, involved a group that protested an artist's work by reproducing 14 fragments in a pamphlet. The U.S. District Court for the Southern District of New York found for the artist under the New York Artists' Authorship Rights Act, but dismissed claims under the Copyright and Lanham Acts.

A few decisions have been rendered since enactment of VARA, although none has yet focused on waiver. Most notable of recent cases is Carter v. Helmsley-Spear, Inc. A large art installation by three sculptors was commissioned for a Queens warehouse, but the owner of the building, demanding the artists vacate the premises, indicated plans to remove the work. The artists sued in district court under VARA and prevailed. The trial court determined that the work was covered by VARA: it was a single work of visual art, not a work of applied art, and not a work-for-hire. The fact that the artists retained their copyright tipped the balance in favor of their independent contractor, rather than employee, status. The district court found that intentional alteration of the installation would injure the artists' reputation. Suggesting a two-tiered approach, that court found the work qualified as one of "recognized stature" in that it has "stature," i.e., is viewed as meritorious, and this stature is "recognized" by art experts, the art community, or some cross-section of society. Rejecting various constitutional attacks on VARA, the district court granted an injunction but said VARA conveyed no right to complete a work and did not justify damages in this case.

On appeal, the Second Circuit analyzed the facts of employment and concluded that the sculpture in question was a work made for hire and therefore was outside the scope of VARA's

protection. It reversed the lower court's award of injunctive relief; therefore, no case has awarded relief to an artist under VARA.

Another recent case, Pavia v. 1120 Avenue of the Americas Associates, held that artists do not have the right under VARA to prevent the continued display after VARA's effective date of works distorted, mutilated, or modified before that date.

#### **IV. COPYRIGHT OFFICE INTERIM REPORT**

On June 10, 1992, 18 months after VARA's enactment, the Office published a Notice of Inquiry in the Federal Register seeking comments on such issues as artists' bargaining power, awareness of VARA rights, inclusion of waiver provisions in contracts, contractual compliance with the requirement that waivers identify works and uses subject to waiver, actual exercise of waivers, and the relative number of waivers granted for moveable works of visual art and for art works incorporated into buildings. The Office requested empirical evidence on the kinds of contracts that include waivers and the economic impact of those waivers; whether the artist's renown affects his or her waiver of rights; and what factors influence artists' decisions to waive rights. The Office asked for comments on possible constitutional problems that might arise if waivers were prohibited and asked for comments on how best to gather information for its final report to Congress.

This initial inquiry on the impact of waiver provisions yielded seven comments. Respondents included purchasers of artworks, a law professor, and several groups who represent artists' interests. Most comments reflected the respondents' limited experience with contractual waiver of VARA rights. One respondent polled a sampling of its membership on VARA issues.

That poll revealed that most artists surveyed had little or no experience with contracts incorporating moral rights.

## **V. COPYRIGHT OFFICE SURVEY AND FINAL REPORT**

The most structured search for empirical evidence on the impact of waiver was the Copyright Office survey, formulated with the assistance of a panel of copyright and visual arts experts and distributed to hundreds of art-related organizations on national, state and local levels. Many of these organizations, particularly state art councils, volunteer art lawyers, and art schools, in turn disbursed hundreds of copies of the survey to their members. The Office mailed 6,800 surveys; many were duplicated in the hundreds by their recipients. These efforts, coupled with art association newsletters that described the VARA study, assured widespread distribution of our survey.

The survey sought to educate and to elicit relevant information. It asked for objective responses to questions about participants' connection to the art world and their awareness of VARA rights. It questioned visual artists about their professional experience and their contractual experience with waiver. All respondents were asked for specific information about art contracts, whether they had encountered any waiver provisions, and the effect of such provisions on relative bargaining power. Finally, the survey provided an opportunity for open-ended comments on VARA concerns.

More than 1,000 persons filed written responses to the survey. Responses were received from 47 states and the District of Columbia, and 955 respondents were self-described visual



artists. Most artists who responded grossed less than \$10,000 annually from their artwork and most had multiple sources of income.

About three-quarters of respondents claimed awareness of moral rights, although many elaborated in written comments on the need for further education of artists. Fewer than half knew moral rights could be waived. Seven percent of the 489 respondents answering the question said waiver clauses were routinely included in artists' contracts.

Nearly one quarter of responding artists covered by VARA knew of artists who had been asked to waive moral rights. Nearly 13 percent of VARA artists said they had refused contracts because they included waivers. A similar number had insisted that a waiver clause be struck from a contract. These artists were generally those who earned more than \$25,000 annually from their art or were represented by an agent. More than half of the 269 VARA Artists expressing an opinion, however, believed that rejecting a request for waiver could threaten the deal.

More than half of the 151 respondents who had seen waivers and answered the question said they complied with the specificity requirements of VARA, and about one-third of 136 respondents said contracts contained a separate price for the waiver of moral rights. However, most art sales contracts continue to be oral and therefore cannot contain valid waiver clauses under the terms of VARA. In general, those participants who included written comments believed that VARA does little to enhance artists' inferior bargaining position relative to the buyer. Many artists decried the complexity of art contracts and stated that legal requirements were too burdensome and legal advice too costly.

Comments on the effectiveness of VARA were predictably varied. Some affirmed the Act's goals but considered the waiver provisions to be an "escape clause" for buyers to avoid honoring moral rights. Other artists were convinced the law would not change the relatively weak bargaining power of artists. Some decried the "recognized stature" standard for protection against destruction of works as too narrow and incapable of definition. One commentator suggested that waivers should be valid only where the purchaser demonstrates a "compelling reason" for requiring one. Several comments remarked that the law was unenforceable, largely because enforcement is too costly.

## VI. COPYRIGHT OFFICE PUBLIC HEARING

On June 21, 1995, the Copyright Office held a public hearing to solicit comments on the effect of the waiver of moral rights provision of VARA. The Office also accepted written comments submitted by July 31, 1995.

Those responding to the Copyright Office Request for Comments through oral and written testimony were by no means unanimous in their views, but a few themes stood out. It is still early to measure effects of VARA waiver provisions due to the low level of VARA awareness. Effective VARA waivers are rare because written contracts for art transactions are rare. There is a distinction between "moveables," such as paintings and sculptures, and works incorporated into buildings. Waivers for the latter, as recognized in section 113(d), are likely to increase after the Carter case.

Some believed waiver should be repealed or modified for moveables (that is, for the majority of works addressed in section 106A). Most saw the need for the section 113(d) waiver

provisions for works incorporated into buildings. although for one attorney, the fact that most contracts for major commissions will now routinely require waivers means that the section 113(d) waiver provision should be tightened, if not repealed. Many panelists at the public hearing believed that repeal of section 113(d) waiver would result in a chilling effect on creation of art, since property owners may be unwilling to commit to a permanent structure. On the other hand, there may be such an effect even where building owners have secured a waiver: several artists reported that if they had been operating under a waiver, they would have undertaken the project, but with a different scale and design. Some predicted a standard term in landlord-tenant contracts requiring tenants to get waivers or refrain from installing art.

The discussion at the public hearing distinguished moveables from major, commissioned works in general, and predicted pro forma waivers for the latter. If waivability is desirable for installed works and ill-advised for moveables, however, the answer is not as simple as repealing the section 106A waiver provisions and preserving those in section 113(d). The comments indicated that major works include large, government-commissions and installed pieces that may not be incorporated into buildings. Section 113(d) deals only with works incorporated into buildings; all other VARA works are addressed in section 106A. Section 113(d) may need modification on this point if waivability under 106A is repealed. A related question is whether removal of a site-specific work, even without damage, would infringe rights of integrity or attribution.

Other recommendations were made. Several parties agreed that one joint author should not be able to waive moral rights for all coauthors. Others believed VARA should apply to print

or broadcast reproductions of works, to cover distortions in books, magazines and electronic media.

## VII. WAIVER PROVISIONS IN ARTISTS' CONTRACTS

The terms "gallery," "dealer," and "agent" are often used interchangeably in art contracts, but galleries, in their function as exclusive artist representative, are more likely than dealers and agents to be involved in waiver of moral rights. Visual Artists and Galleries Association Executive Director Robert Panzer believed waivers will most often be initiated by purchasers insisting that a sale include a written contract waiving moral rights.

About a dozen examples of moral rights waivers from sample contracts were either submitted in response to the Copyright Office 1995 Notice of Inquiry or found in various texts. The contracts submitted included a variety of waiver provisions. The Nimmer copyright treatise included one contract that offers broad language to be used in a commission agreement or bill of sale if an artist is willing to waive moral rights. With respect to the VARA requirement that the use of the work for which rights are waived be specifically identified, Nimmer suggests that the work's use is "as a work of visual art;" the waiver apply to all applications in which either the attribution or integrity right may be implicated.

A Campbell's Soup Art Contest demanded of entrants that they waive moral rights and transfer copyright to the soup company. A Seattle Transit Project contract permitted the metro system to remove a work without the artist's approval if a designated arts committee so recommends and if the artist has the right of first refusal to remove and purchase the work. A Massachusetts Bay Transportation Authority contract provided that state moral rights in a work

that cannot be removed without substantial damage are "automatically waived" unless expressly reserved in a recorded instrument.

A 1994 agreement with the Los Angeles County transportation authority permitted removal of artwork in the Authority's sole discretion, even where removal could cause physical defacement, and an art installation at the Philadelphia Convention Center required complete waiver of VARA rights. Finally, some lease agreements between tenants and landlord are beginning to limit tenants' ability to install art without first obtaining waiver and/or landlord's permission.

### **VIII. RECOMMENDATIONS OF THE REGISTER OF COPYRIGHTS**

The Copyright Office examined and weighed carefully the varied opinions and experiences that artists, users and other interested parties reported in response to the Notice of Inquiry, formal survey and public hearing. The Office considered sample artists' contracts that contained waiver provisions, case law and state moral rights legislation and the experience of representative foreign nations who have recognized moral rights for many years. These sources confirmed that, because federal moral rights legislation is in its infancy in this country, and because artists and often art consumers are frequently unaware of moral rights, accurate predictions on the impact of VARA's waiver provisions are difficult to make at this time. However, some comments and conclusions are appropriate.

By providing limited moral rights of integrity and attribution to authors of narrowly defined works of fine arts and exhibition photographs, VARA adopts the spirit of author

protection mandated by the Berne Convention and legislated by many industrialized and developing countries. Congress' resolve to balance authors' rights with purchasers' commercial interests is reflected in VARA's waiver provisions that permit an author to waive his or her moral rights in a signed written instrument specifying the work and the uses of the work to which the waiver applies. The focus of the Office's congressionally mandated study was to assess the impact of VARA's waiver provision: to investigate whether artists are being coerced by their unequal bargaining power to waive their moral rights, and whether parties are adhering to the statutory rules governing waivers.

The Office's inquiry on these questions was conducted after background research into the development of moral rights domestically, in state legislation and case law and, internationally, in the standards established by the Berne Union and the legislation and case law of foreign countries. Of the foreign nations whose laws were consulted, only those of the common law countries, the United Kingdom and Canada, contain express waiver provisions, although other nations temper artists' rights by contract or equity. In the United States, federal courts have thus far offered little guidance on the operation and application of VARA. The single case that afforded VARA protection at the lower court level was overturned on appeal, when the court found that the work was outside VARA's scope of protection because it was a work made for hire.

The Copyright Office examined and weighed carefully the opinions and experiences of more than 1000 artists, users, and other interested parties who responded to the Office's inquiry. The comments and conclusions offered in this chapter are based largely on results gleaned from

the Copyright Office survey, request for comment, public hearing, and review of sample art contracts containing waiver clauses.

The Office study highlights the unique position of domestic artists creating works in a country with a strong legal doctrine of work-made-for hire. Such works are expressly exempted from VARA protection and may account for a number of major art works, including major commissions, installed works and works incorporated into buildings. At the other end of the spectrum of art sales are so called "moveable" works, a category that defines the bulk of works of the visual arts. Because VARA waiver provisions apply only to works sold by written contract, and because sales of moveables typically are made by oral agreement rather than written contract, most moveable works are unaffected by waiver. Artists who contract orally for sale of their works of visual art enjoy the full gambit of moral rights protection. There is a demonstrated low level of artist awareness about VARA, particularly on the part of those who earn less than \$10,000 annually from the sale of their art and those who are not represented by an agent or gallery. An assessment of the impact of VARA's waiver provisions is incomplete unless affected parties are knowledgeable about their rights and responsibilities. The Office attempted to educate affected parties in conjunction with its VARA research, but this research principally targeted the organized arts community through arts associations, state art councils, art schools and the like. Individual artists who are not members of a group may remain unaware of their rights. The Office will distribute a VARA fact sheet to respond to public inquiries and address VARA rights in public speeches and seminars, but budget restrictions preclude the Office from further educational efforts. The Office encourages the arts community to pursue

active measures to raise artists' consciousness about VARA rights and legal remedies available if those rights are transgressed.

There were 950 artists covered by VARA who responded to the Office's survey. Of the 862 VARA Artists responding to the question, 13 percent said they had refused contracts because they included waivers and a similar number had insisted that a waiver clause be struck from a contract. Of those responding artists who expressed an opinion, about half believed that rejecting a waiver request could terminate contract discussions. Artists more familiar with moral rights and waiver generally earned more than \$25,000 annually from sale of their art or were represented by an agent, and tended to believe that VARA had little impact upon artists' typically inferior bargaining power.

A near consensus among commentators at the public hearing affirmed the need to retain section 113(d) waivers for works incorporated into buildings as a necessary protection allowing property owners to contract for creation of permanent artistic structures. Artists, artists' representatives and one academic argued for the abolition of section 106A's waiver provision for moveable works, however. Professor Damich contended, with respect to these works, that the integrity right should not be waivable by advance contract, but should be modifiable only by an artist's revocable consent to a specific alteration. The Office concludes that, because most moveable works are transferred by oral contract, a transaction unaffected by waiver, no legislative action is warranted to modify section 106A at this time. VARA has strengthened artists' legal rights in moveable works and, unless written contracts for such works become more prevalent, there is little risk that waiver will diminish them.



If Congress proposes eliminating waivability for moveable works of visual art under section 106A, it should consider whether certain installed works that are not structurally incorporated into a building, including site-specific works, major commissioned works, and large government commissions should continue to be subject to a possible waiver. Such works may not be covered by section 113(d), but respondents in the Office study argued persuasively that waiver for these works is necessary to protect buyers' investments and that, absent waivers, buyers might be unwilling to contract for creation of such works now that they are subject to moral rights protection.

A point of relative consensus voiced in the Office's public proceedings and in academic sources such as Nimmer on Copyright was that VARA inappropriately permits one joint author to waive the moral rights of coauthors in a joint work. The Office suggests that this statutory provision, although undoubtedly designed to parallel joint authors' economic rights, is an unwarranted derogation of moral rights. Congress may wish to amend the statute to provide that no joint author may waive another's statutory moral rights without the written consent of each joint author whose rights would be affected.

The Office was unable to assess definitively whether moral rights waivers in art contracts are meeting the specificity requirements of VARA because only a dozen contracts were submitted in response to the Office inquiry. The copyright treatise, Nimmer on Copyright, however, suggests that not every use need be described in a waiver because a work of visual art is assumed to be used as a work of visual art. Fewer than half of the 136 respondents who had seen waivers and expressed an opinion said the uses affected by waiver were specifically

identified in contracts they had seen, and many of the contracts reviewed by the Office described the uses affected by a waiver in broad terms. Congress may wish to clarify VARA to indicate more directly what it intended by requiring that contracts specifically identify the uses to which a waiver applies if it views such provisions as inappropriately broad.

A host of other issues raised in the course of the study are summarized in chapter VII, but because none evoked a consensus and all seemed beyond the scope of the study, the Office offers no recommendations on these points. Congress may wish to review them if it revisits moral rights policy issues at some future time.

## I. THE VISUAL ARTISTS RIGHTS ACT OF 1990: INTRODUCTION

### A. VARA PROVISIONS AND SCOPE OF THIS REPORT

The purpose of this report is to fulfill Congress' mandate to the Register of Copyright to study the extent to which rights conferred by the Visual Artists Rights Act of 1990 (VARA)<sup>1</sup> have been waived and to report the results of such study and any recommendations the Register may have.<sup>2</sup> An interim report was submitted to Congress on December 1, 1992.<sup>3</sup> The present document constitutes the Copyright Office's final report and recommendations.

The Visual Artists Rights Act of 1990 was signed into law on December 1, 1990, and became effective June 1, 1991. It amends the 1976 Copyright Act<sup>4</sup> by adding Section 106A to grant limited moral rights to authors of specifically defined works of visual art. These rights, derived from the French doctrine of "droit moral" or personal, non-economic rights, give the author 1) the right of attribution, which is the right to claim or disclaim authorship in a work; and 2) the right of integrity, which is the right to prevent distortion, mutilation or

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<sup>1</sup> Pub. L. No. 101-650, 104 Stat. 5128 (1990), codified in part as 17 U.S.C. § 106A. The text of 17 U.S.C. § 106A is reproduced in Appendix, Part I.

<sup>2</sup> Section 608 of the Visual Artists Act of 1990 directed that:

(1) STUDY.--The Register of Copyrights shall conduct a study on the extent to which rights conferred by subsection (a) of section 106A of title 17, United States Code, have been waived under subsection (e)(1) of such section.

(2) REPORT TO CONGRESS.--Not later than 2 years after the date of the enactment of this Act, the Register of Copyrights shall submit to the Congress a report on the progress of the study conducted under paragraph (1). Not later than 5 years after such date of enactment, the Register of Copyrights shall submit to the Congress a final report on the results of the study conducted under paragraph (1), and any recommendations that the Register may have as a result of the study.

<sup>3</sup> U.S. Library of Congress, Copyright Office, Interim Report of the Register of Copyrights: Waiver of Moral Rights in Visual Artworks [hereinafter Interim VARA Report] (Dec. 1992).

<sup>4</sup> 17 U.S.C. §§ 101-1010.

other modification of work. Under certain circumstances, the right of integrity also affords the right to prevent destruction of a work that is incorporated into a building.<sup>5</sup>

VARA applies only to "works of visual art" as narrowly defined by the Act. A "work of visual art" includes a painting, drawing, print or sculpture existing in a single copy, or in a limited edition of 200 copies or fewer which are signed and consecutively numbered by the author (or, in the case of a sculpture, which bear an identifying mark). It also includes a still photograph produced for exhibition purposes only, existing in a single copy signed by the author or in a limited edition of 200 copies or fewer which are signed and consecutively numbered by the author.<sup>6</sup>

VARA is further limited as to the types of works it covers. The Act confers no rights for works made for hire, nor for any poster, map, globe, chart, technical drawing, diagram, model, work of applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication. Also excluded are any merchandising items or advertising, promotional, descriptive, covering, or packaging material or container, or any portion of such excluded works.<sup>7</sup> For example, if a painting, sculpture, print, drawing, or artistic photograph were made part of a motion picture or a magazine as a derivative work or a work for hire, the moral rights established by VARA would not apply.

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<sup>5</sup> See 17 U.S.C. § 113(d). The text of 17 U.S.C. §113(d) is reproduced in Appendix Part II.

<sup>6</sup> 17 U.S.C. § 101 (definition of "work of visual art").

<sup>7</sup> Id.

The rights provided by VARA are personal to the author and may be waived but not transferred.<sup>8</sup> This waiver provision presents a new situation for visual artists and other affected parties. When Congress passed VARA, it considered whether or not the rights contained in the Act should be waivable by artists, or should, instead, be absolutely inalienable. It recognized that "[a]lthough the section 106A rights of attribution and integrity are separate from the economic rights granted in section 106, the issue of whether section 106A rights are waivable, assignable, or transferable has important economic consequences."<sup>9</sup> It noted that to permit waiver might require the author to bargain away rights because of his or her weak economic position, but to preclude waiver would alter normal commercial practices.<sup>10</sup> Congress finally decided to allow visual artists to waive by a signed written instrument the section 106A rights of integrity and attribution, but it required that the writing must specify the affected uses of the work and identify the specific work covered by the waiver. Blanket waivers are not permitted.<sup>11</sup> Waivers may not be implied from the transfer of copyright ownership or transfers of material objects in which copyrighted works are embodied.<sup>12</sup>

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<sup>8</sup> 17 U.S.C. § 106A(e)(1).

<sup>9</sup> H.R. Rep. No. 514, 101st Cong., 2d Sess. 18 (1990).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 19.

<sup>12</sup> 17 U.S.C. § 106A(e)(2).

With respect to a joint work,<sup>13</sup> absent an agreement to the contrary, one co-author may license the work without the agreement of the other co-authors, subject to the licensor's obligation to account for profits generated from licensing the work.<sup>14</sup> VARA allows one joint author to waive rights in the work for all joint authors.<sup>15</sup>

Because Congress feared that an author in a relatively weak economic position might be forced to waive rights to earn a living in the marketplace, it legislated in VARA a requirement that the Copyright Office assess the effects of the waiver provision on authors and present its findings within five years after passage of the Act.<sup>16</sup> The legislative intent was to ensure that "the waiver provisions serve to facilitate current practices while not eviscerating the protections provided by the...law",<sup>17</sup> and to this end Congress requested information on whether waivers are routinely given, whether artists are compelled by unequal

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<sup>13</sup> A "joint work" is "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." *Id.* § 101 (definitions).

<sup>14</sup> 17 U.S.C. § 201(a).

<sup>15</sup> "In the case of a joint work prepared by two or more authors, a waiver of rights...made by one such author waives such rights for all such authors." 17 U.S.C. § 106A(e)(1). Congress determined that if a joint author agrees in writing to waive either the right of attribution, or the right of integrity, or both, in exchange for some form of compensation, the joint author would have "a duty to account to the other joint authors." H.R. Rep. No. 514, 101st Cong., 2d Sess. 19 (1990) (citing *Oddo v. Ries*, 743 F.2d 630 (9th Cir. 1984)). One author objects to VARA's joint authorship provisions. See Peter H. Karlen, *Moral Rights and Real Life Artists*, 15 HASTINGS COMM. & ENT. L. J. 929, 945 (1993). Mr. Karlen writes, "moral rights laws need their own peculiar joint authorship rules, preferably set forth by statute, otherwise the courts will spend decades developing and interpreting these rules." *Id.* at 946. See also *infra* Ch. VI (Comments on VARA joint authorship provisions at the Copyright Office June 21, 1995, public hearing).

<sup>16</sup> Visual Artists Rights Act of 1990 § 608, Pub. L. No. 101-650, 104 Stat. 5128 (1990). Congress granted an extension to permit the Copyright Office to file its final report by March 1, 1996. See also *Interim VARA Report*, *supra* note 3.

<sup>17</sup> H.R. Rep. No. 514, 101st Cong., 2d Sess. 22 (1990).

bargaining power to waive their rights, and whether the rules governing waiver are being observed.<sup>18</sup>

In this report, the Copyright Office responds to this congressional mandate. Chapter One describes relevant VARA provisions, the Act's legislative roots, and state law protection. Chapter Two reviews the evolution of the doctrine of moral rights, particularly in relation to the Berne Convention for the Protection of Literary and Artistic Works,<sup>19</sup> and reports on waiver practices in other countries. Chapter Three discusses moral rights in United States case law. Chapter Four recaps the Office's Interim Report on waiver of moral rights. Chapter Five relates information gleaned from a Copyright Office survey that asked artists to describe their experiences under VARA. Chapter Six discusses the results of a public hearing on June 21, 1995, at which the Office asked for comments from interested parties on VARA's provisions and practical effects. Chapter Seven examines waiver provisions in artists' contracts. Finally, in Chapter Eight, the Register of Copyrights offers her conclusions on operation of the VARA waiver provisions and makes recommendations to Congress for its consideration.

## **B. EARLIER FEDERAL BILLS**

At the time the United States debated adhering to the Berne Convention, most interested parties contended that no federal moral rights legislation was required for United

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<sup>18</sup> *Id.*

<sup>19</sup> Berne Convention concerning the Creation of an International Union for the Protection of Literary and Artistic Works (Sept. 9, 1886, revised in 1908, 1928, 1948, 1967, 1971), 25 U.S.T. 1341 [hereinafter Berne Convention].

States adherence, but Congress concluded that further consideration of artists' rights laws was in the spirit, if not the letter, of Berne.<sup>20</sup> In fact, United States' efforts to enact federal moral rights legislation date back to 1979, and the introduction of a bill seeking to protect visual artists.<sup>21</sup> A number of horror stories circulating in the art community prior to enactment of VARA helped convince legislators to pass the first federal moral rights law. In 1960, the David Smith sculpture, 17 h's. was stripped of its original red paint by the owner. Because Smith was unable to force the owner to restore the work, he publicly disavowed authorship of it.<sup>22</sup> In 1980, a sculpture by Isamu Noguchi called Shinto, designed in 1975 for the New York headquarters of the Bank of Tokyo Trust Company, was removed from its ceiling suspension, cut into pieces for storage, and later destroyed, without Noguchi's knowledge or consent.<sup>23</sup> A black and white Alexander Calder mobile, installed in the Greater Pittsburgh International Airport from 1958 to 1978, was repainted green and yellow (the county's colors), weighted and motorized to turn with mechanized regularity, hung

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<sup>20</sup> H.R. Rep. No. 609, 100th Cong., 2d Sess. 32-40 (1988). See infra Ch. II for a discussion of Berne Convention standards.

<sup>21</sup> H.R. Rep. No. 514, 101st Cong., 2d Sess. 8 (1990). In a footnote, the Report cited several House and Senate bills that addressed aspects of moral rights; including H.R. 288, 96th Cong., 1st Sess., 125 Cong. Rec. 164 (1979); H.R. 2908, 97th Cong., 1st Sess., 127 Cong. Rec. H5691 (1981); H.R. 1521, 98th Cong., 1st Sess., 129 Cong. Rec. 2414 (1983); H.R. 5772, 99th Cong., 2d Sess., 132 Cong. Rec. 32,704 (1986); S. 2796, 99th Cong., 2d Sess., 132 Cong. Rec. S12,185 (daily ed. Sept. 9, 1986); S. 1619, 100th Cong., 1st Sess., 133 Cong. Rec. S11,470 (daily ed. Aug. 6, 1987); and H.R. 3221, 100th Cong., 1st Sess., 133 Cong. Rec. E3425 (daily ed. Aug. 7, 1987).

<sup>22</sup> Walter Robinson, Art & the Law: 'Moral Rights' Comes to New York (1983), reprinted in JEFFREY L. CRUIKSHANK & PAM KORZA, GOING PUBLIC: A FIELD GUIDE TO DEVELOPMENTS IN ART IN PUBLIC PLACES 256 (1988).

<sup>23</sup> Id. at 257.



among advertisements, and allowed to become grimy.<sup>24</sup> Most dramatically, two Australian entrepreneurs cut Picasso's "Trois Femmes" into hundreds of pieces and sold them as "original Picasso pieces."<sup>25</sup>

In 1989, following United States adherence to Berne, the House of Representatives considered H.R. 2690, The Visual Artists Rights Act of 1989, and the Senate introduced a companion bill, S. 1198.<sup>26</sup> The two bills differed in their approach to waiver and term. The Senate version did not allow waiver of the moral rights granted by the bill, but the House bill did. Both bills provided for a term of life plus fifty years, but the House bill contained specific duration language concerning joint works that the Senate bill did not.

H.R. 2690 proposed that the moral rights of attribution and integrity granted to certain visual artists could be waived, and could be transferred on the author's death by bequest or by intestate succession. By the terms of the 1989 bill, an author could waive his or her moral rights only by a signed written instrument that specifically identified the work and the uses of the work to which the waiver would apply. An amendment introduced by Chairman Kastenmeier further refined the waiver provisions to permit one joint author's waiver to bind all other joint authors.<sup>27</sup> During the second session of the 101st Congress, H.R. 2690, as amended, became the Visual Artist Rights Act of 1990.

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<sup>24</sup> *Id.*

<sup>25</sup> *See* H.R. Rep. No. 514, 101st Cong., 2d Sess. 17 (1990).

<sup>26</sup> H.R. 2690, 101st Cong., 1st Sess. (1989); S. 1198, 101st Cong., 1st Sess. (1990). The bills were sponsored by Representative Robert Kastenmeier and Senator Edward Kennedy, respectively.

<sup>27</sup> H.R. Rep. No. 514, 101st Cong., 2d Sess. 7 (1990).

## C. STATE LAW MODELS FOR PROTECTING MORAL RIGHTS

### 1. The European moral rights model

Originating in Europe, the concept and observance of moral rights, or "droit moral", addresses the personal, rather than the economic, relationship between an author and his or her work. The rights uphold the integrity of an author's personality and the integrity of his or her work by preventing separation of the creator's personality from his or her work of authorship; the indelible impression of the artist's intellectual creation remains part of the work, even though it is more intangible than the economic rights in that work. France was the first to embody moral rights within the copyright law; other western European and Latin American countries followed France's lead. Moral rights were later added to the Berne Convention in 1928.<sup>28</sup> Berne generally affords greater personal protection for more works of authorship than given by the United States under VARA.<sup>29</sup>

Before adhering to Berne, the United States had relied, for international copyright protection, on its bilateral treaties and on the Universal Copyright Convention (UCC),<sup>30</sup> a

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<sup>28</sup> See *infra* Ch. II. See also Berne Convention (Paris Act 1971), *supra* note 19, at Art. 6bis. Art. 6bis provides that:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

<sup>29</sup> The Berne Convention's moral rights protection encompasses: the right to claim authorship of a work, and the right to protect the integrity of the work, i.e., the right to object to any distortion, mutilation, or other modification of a work, or other action which would be prejudicial to the author's honor or reputation. See Berne Convention (Paris Act 1971), *supra* note 19; see also Sam Ricketson, The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986 467-472 (1987).

<sup>30</sup> Universal Copyright Convention (Sept. 6, 1952), 6 U.S.T. 2731.

multilateral copyright treaty to which the United States adhered as a founding member on September 16, 1955. Neither the bilaterals nor the UCC required moral rights protection.

On March 1, 1989, the United States adhered to the 1971 Paris text of the Berne Convention. In its review of whether the United States should adhere to Berne, Congress considered whether or not additional provisions for moral rights had to be added to United States Copyright law in order to meet the obligations of Berne's Article 6bis.<sup>31</sup> By requiring certain minimum rights, the Berne Convention promotes harmonization among the laws of member nations. The Convention allows countries to implement the provisions in their national laws. This framework allowed the Congress to determine that existing law satisfied the minimum standard for protection of moral rights required by Berne.<sup>32</sup> Because Congress also provided that Berne is not self-executing in the United States, moral rights cannot be claimed here directly on the basis of the Berne text.

The Berne Convention Implementation Act (BCIA)<sup>33</sup> reflected Congress' opinion that at the time the United States joined Berne, our domestic law was adequate to satisfy the minimum obligations of membership. Moral rights protection, Congress maintained, could be found in the Lanham Act<sup>34</sup> and common law or First Amendment principles such as libel, privacy, defamation, misrepresentation or unfair competition. This view had been

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<sup>31</sup> Certain countries take the position that the Berne Convention is self executing. The United States does not.

<sup>32</sup> H.R. Rep. No. 609, 100th Cong., 2d Sess. 32-40 (1988).

<sup>33</sup> Pub. L. No. 100-568, 102 Stat. 2853 (1988).

<sup>34</sup> See Lanham Act, § 43(a), 15 U.S.C. § 1125(a)(1946).

articulated by the Ad Hoc Working Group of private sector and government attorneys formed specifically for the purpose of comparing United States law with Berne requirements. The Working Group published its findings in a final report.<sup>35</sup> The report maintained that, although there are no explicit moral rights provisions in the 1976 Copyright Act, relevant federal statutory provisions including 17 U.S.C. §§106(2)(exclusive right to make derivative works), 101(definition of "derivative work") and 115(a)(2)(mechanical license) afford protection of a type envisioned by Berne. In addition, the Working Group cited protection under section 43(a) of the Lanham Act and decisions made under that law, as well as state common law principles and state statutes protecting rights equivalent to the Berne Convention's Article 6bis.<sup>36</sup> The Group concluded that:

Although the United States does not have a statute that grants, in haec verba, the moral rights set forth in Article 6bis, there are substantial grounds for concluding that the totality of U.S. law provides protection for the rights of paternity and integrity sufficient to comply with 6bis, as it is applied by various Berne countries.<sup>37</sup>

Regarding transferability and waiver of moral rights, the Group noted that in some countries authors' moral rights are alienable, although courts may interpret application of the rights in different ways, depending on the facts of each case.<sup>38</sup> The Group also noted that a

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<sup>35</sup> Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, [hereinafter Ad Hoc Working Group Report] 10 COLUM.-VLA J. L. & ARTS 513 (1986).

<sup>36</sup> Id. at 548.

<sup>37</sup> Id. at 555.

<sup>38</sup> Id. at 556.

1986 British White Paper on copyright revision stated that proposed legislation in the United Kingdom would provide that "an author will be able to waive his moral rights, and such waiver will override any inheritance or bequest."<sup>39</sup> Hence, Article 6bis principles were not always followed to the letter by other Berne member countries. For example, Berne is silent on waiver, but its spirit would seem to be more honored without provision for waiver. In sum, by enacting VARA Congress responded to a perceived public interest in protecting works of art against mutilation and destruction, and in providing for proper attribution of authorship.

## 2. Moral rights in state statutes

Before the United States enacted VARA, several states passed legislation that specifically protected artists' rights. In addition, New Mexico enacted legislation in 1995 to protect art in public buildings. Three basic state law models exist: the preservation model, the moral rights model, and the public works model.<sup>40</sup> The preservation model is used to protect artistic works from destruction, as well as to protect rights of attribution and integrity. The moral rights model provides the rights of attribution and integrity.<sup>41</sup> The public works category, which is more related to state police power than to copyright administration, seeks to protect works from vandalism. These laws safeguard state treasures,

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<sup>39</sup> Id.

<sup>40</sup> See Visual Artists Rights Act of 1989: Hearings on H.R. 2690 Before the Subcomm. on Courts, Intellectual Property and the Administration of Justice, House Comm. on the Judiciary, 101st Cong., 1st Sess. 33 (1989) [hereinafter Hearings on VARA] (statement of Ralph Oman, Register of Copyrights).

<sup>41</sup> Destruction is not, strictly speaking, a violation of a moral right in states using that model, since where the work is destroyed, the moral right can be considered extinguished because nothing is left to which the right can attach.

antiques, and other works of historic or other value as part of a normal exercise of keeping the peace.<sup>42</sup> A summary of state statutes follows.

a. **Preservation Statutes.**

(i) **California.** In 1979, California became the first state to enact moral rights legislation.<sup>43</sup> The California Art Preservation Act seeks to preserve works of fine art and to protect the personality of the artist. The preamble to the Act states that "the act serves the dual purpose of protecting the artist's reputation and of protecting the public interest in preserving the integrity of cultural and artistic creations."<sup>44</sup> The Act prohibits the intentional "physical defacement, mutilation, alteration, or destruction of a work of fine art."<sup>45</sup> Where the alleged mutilation is associated with an effort to conserve a work of fine art, evidence of gross negligence is required to support an action.

The artist also has a right of attribution, and "for just and valid reason," the right "to disclaim authorship of his or her work of fine art."<sup>46</sup> The rights of attribution and integrity may be waived by written contract. Owners of buildings who wish to remove a work of fine art that can be removed without mutilation are subject to liability under the act unless they attempt to notify the artist of their intention and provide the artist with an opportunity to

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<sup>42</sup> **Hearings on VARA**, *supra* note 40, at 34.

<sup>43</sup> CAL. CIV. CODE § 987 (West Supp. 1995).

<sup>44</sup> 1 JOHN HENRY MERRYMAN & ALBERT E. ELSSEN, **LAW, ETHICS, AND THE VISUAL ARTS** 163 (1987).

<sup>45</sup> CAL. CIV. CODE § 987(c) (West Supp. 1995).

<sup>46</sup> *Id.* § 987(d).

remove the work. Where the work cannot be removed without mutilation or destruction, moral rights are deemed to be waived unless the artist has reserved them in writing.<sup>47</sup>

(ii) **Connecticut.** The 1988 Connecticut law, another preservation statute, covers works of fine art including calligraphy, craft works, and photographs with a minimum market value of \$2500 or more.<sup>48</sup> Works made for hire are excluded from the definition of works of fine art. Under this act, the artist may waive his or her rights in writing. As amended in 1988, the Connecticut act provides a life-of-the-author plus fifty year duration for moral rights. The provisions on removing art from buildings are similar to those in the California Act, except that in Connecticut, the artist's reservation of rights must be recorded in the state's real property records.<sup>49</sup>

(iii) **Massachusetts.** The 1984 Massachusetts statute prohibits "the intentional commission of any physical defacement, mutilation, alteration, or destruction of a work of fine art."<sup>50</sup> The artist retains a right of attribution and the right to disclaim authorship "for just and valid reason." If a work of fine art cannot be removed from a building without substantial alteration, the prohibitions of the Act are suspended unless a written obligation signed by the owner of the building has been recorded.<sup>51</sup> If the work is

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<sup>47</sup> *Id.* § 987(h).

<sup>48</sup> CONN. GEN. STAT. ANN. § 42-116s - 42-116t (West 1995).

<sup>49</sup> See Hearings on VARA, *supra* note 40, at 35.

<sup>50</sup> MASS. GEN. LAWS ANN. ch. 231, § 855 (West Supp. 1995).

<sup>51</sup> *Id.* § 855(h)(1).

capable of being removed without mutilation, the prohibitions of the act apply unless the owner notifies the artist and provides the artist with an opportunity to remove it.<sup>52</sup>

(iv) **Pennsylvania.** The 1986 Pennsylvania Fine Arts Preservation Act prohibits destruction of works of fine art and establishes moral rights for those works.<sup>53</sup> Similar to the California law, the Pennsylvania Act applies to works of recognized quality. In addition to providing special rules for removing works of art from buildings, the Pennsylvania law excuses from liability, for alteration or destruction, those owners who remove works of art in "emergency situations."<sup>54</sup> Conservation activities that are not grossly negligent are also not actionable.<sup>55</sup>

**b. Artists' Moral Rights Statutes.**

(i) **Louisiana.** Louisiana's Artists' Authorship Rights Act of 1986 protects visual or graphic works of recognized quality in any medium reproduced in not more than 300 copies.<sup>56</sup> Motion pictures, however, are excluded, as are works prepared under contract for advertising and trade, unless the contract provides otherwise. The Act grants rights of attribution and integrity, but does not cover the destruction of works with the exception of art on buildings. Rights in such works are subject to a special reservation,

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<sup>52</sup> *Id.* § 855(h)(2).

<sup>53</sup> PA. STAT. ANN. tit. 73, §§ 2101-2110 (Purdon Supp. 1995).

<sup>54</sup> *Id.* § 2108(d).

<sup>55</sup> *Id.* § 2104(b).

<sup>56</sup> LA. REV. STAT. ANN. §§ 51:2151-2156 (Purdon West 1995).



similar to reservations found in several other states' statutes.<sup>57</sup> Alterations that occur as a result of conservation efforts are not actionable unless the alteration is the result of gross negligence. Louisiana's rights attach upon public display of the work.<sup>58</sup>

(ii) **Maine.** In 1985, Maine enacted moral rights for artists of visual or graphic works without restriction as to the quality of the work.<sup>59</sup> Similar to the Louisiana act, the Maine act attaches the rights to public display within the state, and excuses conservation activities except for gross negligence. The artist can claim authorship or disclaim it "for just and valid reasons," which include modification likely to cause damage to the author's reputation. No special requirements are established for removing works of art from buildings.

(iii) **New Jersey.** The New Jersey Artists Right Act of 1986 provides protection similar to that of Maine.<sup>60</sup> It excludes motion pictures and makes no special provisions for removing art from buildings.

(iv) **New York.** In 1984, New York passed its New York Artists' Authorship Rights Act.<sup>61</sup> The Act prohibits the display of an "altered, defaced, mutilated,

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<sup>57</sup> See discussion of laws of California, Connecticut, Massachusetts, and Pennsylvania, *supra* text accompanying notes 47, 49, 50, 51 and 54.

<sup>58</sup> LA. REV. STAT ANN. § 51:2153 (Purdon West 1995).

<sup>59</sup> ME. REV. STAT. ANN. tit. 27, § 303 (West 1995).

<sup>60</sup> N.J. STAT. ANN. §§ 2A:24A-1 - 2A:24A-8 (West 1995).

<sup>61</sup> N.Y. ARTS & CULT. AF. LAW §§ 14.01 *et seq.* (McKinney 1995).

or modified form" of a work of fine art which damages the artist's reputation.<sup>62</sup> The artist additionally has a right of attribution, and the right to disclaim authorship for good cause.<sup>63</sup> Conservation does not constitute alteration, defacement, mutilation, or modification unless the conservation is done negligently.<sup>64</sup>

(v) **Rhode Island.** In 1987, Rhode Island passed attribution and integrity rights legislation for works of fine art that are knowingly displayed, published or reproduced in a place accessible to the public.<sup>65</sup> If definition of works of fine art, identical to that of Maine, New York, and New Jersey, is not limited to works of recognized quality.<sup>66</sup> "Alteration, defacement, mutilation or modification of a work of fine art resulting from the passage of time or the inherent nature of the materials," in the absence of gross negligence, is not a violation of the Act.<sup>67</sup>

c. **Art in Public Buildings.** New Mexico's Art in Public Buildings Act is an example of extensive rights in a very limited area.<sup>68</sup> The Act protects against alteration and destruction and provides attribution rights for works displayed in public buildings, thereby limiting its scope to works that are publicly displayed by the state. The Act includes

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<sup>62</sup> *Id.* § 14.53.

<sup>63</sup> *Id.* § 14.55(1).

<sup>64</sup> *Id.* § 14.57(3).

<sup>65</sup> R.I. GEN. LAWS, §§ 5-62-2 - 5-62-6 (Michie 1994).

<sup>66</sup> *Id.* § 5-62-3.

<sup>67</sup> *Id.* § 5-62-5.

<sup>68</sup> N.M. STAT. ANN. §§ 13-4B-2 - 13-4B-3 (Lexis, states library, NMCODE file 1995).

special provisions for works of art that are incorporated in buildings. If the artist is deceased, the state's attorney general is authorized to assert moral rights on behalf of the author.<sup>69</sup>

#### **D. PREEMPTION ISSUES RAISED BY VARA**

Congress intended section 301 of the Copyright Act's "Preemption with respect to other laws," to "preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and that extend to works coming within the scope of the Federal copyright law."<sup>70</sup> Section 301 was amended by the Visual Artists Rights Act of 1990 by adding subsection (f).<sup>71</sup> Following other copyright preemption provisions, this section preempts post-VARA state law causes of action that are equivalent to rights under

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<sup>69</sup> *Id.* § 13-4B-3.

<sup>70</sup> H.R. Rep. No. 1476, 94th Cong., 2d Sess. 130 (1976).

<sup>71</sup> 17 U.S.C. § 301(f) reads as follows:

(f)(1) On or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art to which the rights conferred by section 106A apply are governed exclusively by section 106A and 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.

(2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to --

(A) any cause of action from undertakings commenced before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990;

(B) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A with respect to works of visual art; or

(C) activities violating legal or equitable rights which extend beyond the life of the author.

VARA in subject matter covered by the federal statute.<sup>72</sup> One writer labeled VARA's preemption provision as "one battleground of the near future."<sup>73</sup>

The Supreme Court has used the supremacy clause of the Constitution in case law analysis as authority for validating the preemption doctrine.<sup>74</sup> The definition of "equivalent right" can be unclear when comparing state and federal statutes. When comparing moral rights codes, even larger problems may arise because no body of case law interpreting VARA currently exists. The House Report on VARA states that:

Consistent with current law on preemption for economic rights, the new Federal law will not preempt State causes of action relating to works that are not covered by the law. Similarly, State artists' rights laws that grant rights not equivalent to those accorded under the proposed law are not preempted, even when they relate to works covered by [VARA].<sup>75</sup>

Courts decide on a case-by-case basis whether or not rights protected by state or other laws are preempted by equivalent federal rights. The method often used to analyze preemption issues relating to copyright is to break down the state right into elements, and then to compare those elements with rights granted by the Copyright Act.<sup>76</sup> If extra

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<sup>72</sup> CRAIG JOYCE, ET AL. COPYRIGHT LAW 917 (1991).

<sup>73</sup> Peter H. Karlen, Moral Rights and Real Life Artists, 15 HASTINGS COMM. & ENT. L.J. 929, 946 (1993).

<sup>74</sup> I MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01[B] (1992).

<sup>75</sup> H.R. Rep. No. 514, 101st Cong., 2d Sess. 21 (1990).

<sup>76</sup> Sophia Davis, State Moral Rights Law and the Federal Copyright System, 4 CARDOZO ARTS & ENT. L. J. 233, 247 (1985).

elements are found in the state right that are not found in the federal law, the state right is not preempted.<sup>77</sup>

Previously, preemption of states' rights by federal copyright law concerned only equivalent legal or equitable rights within the subject matter of copyright, and these rights were economic. Preemption under VARA will focus both on whether moral rights and subject matter are equivalent. Thus, to prevail on a VARA preemption argument, one will need to prove "prejudice to honor or reputation,"<sup>78</sup> in addition to equivalent subject matter. The extent to which state statutes will be preempted awaits case law development.

It is expected that a number of state laws will continue to have effect either because they protect additional elements or VARA was not in effect at the time the cause of action arose.

In one recent case concerning the New York Arts and Cultural Affairs law, for example, Pavia v. 1120 Avenue of the Americas Associates,<sup>79</sup> defendants asserted that VARA preempted section 14.03 of the New York law. Noting that whether VARA rights are equivalent to rights conferred under the New York statute for preemption purposes was a question that would "occupy courts for years to come...",<sup>80</sup> the U.S. District Court for the Southern District of New York nevertheless ruled that the issue need not be confronted in the

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<sup>77</sup> Id.

<sup>78</sup> 17 U.S.C. § 106(a)(2).

<sup>79</sup> 901 F. Supp. 620 (S.D.N.Y. 1995).

<sup>80</sup> Id. at 626 (quoting Charles Ossola, Law for Art's Sake, The Recorder, Jan. 8, 1991, at 6).

case. The alleged improper display of artist Philip Pavia's work was commenced in 1988, before VARA's effective date of June 21, 1991, and VARA does not preempt state or common law for causes of action arising from undertakings commenced before its effective date.<sup>81</sup>

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<sup>81</sup> Id. (citing 17 U.S.C. § 301(f)(2)(A)).

## II. MORAL RIGHTS IN OTHER COUNTRIES

The moral right of an artist is "usually classified in civil law doctrine as a right of personality, and in particular is distinguished from patrimonial or property rights."<sup>82</sup> The French doctrine of *droit moral* originated through court decisions, although "the moral right of the artist was later put into statutory form in France and in many other civil law nations."<sup>83</sup> As one writer states, "the very term 'copyright' distinguishes U.S. (and even British) from continental law; to some Europeans, our term seems to define...work as merchandise. Continental languages employ a phrase that translates as 'author's right'....[O]ne side seems to be protecting a 'copy' while the other focuses on the creator."<sup>84</sup>

As discussed earlier in this report, the Visual Artists Rights Act of 1990 adopted the moral rights of attribution and integrity for certain works of visual artists. The Copyright Office believes that as part of its report to Congress about the impact of VARA's waiver provision on visual artists, it is important to review the origins of moral rights contained in the Berne Convention, and to survey the laws of representative nations to determine whether or not statutes or case law address waiver of moral rights in visual artworks. Information gathered from this review will provide information about recognition other countries give

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<sup>82</sup> 1 JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS, AND THE VISUAL ARTS 144 (1987).

<sup>83</sup> Id.

<sup>84</sup> Herbert R. Lottman, Copyright: Europe's Extension of Protection Keeps Lawyers Busy 242 PUBLISHERS WEEKLY 12 (May 15, 1995).

moral rights and whether these countries permit waiver of these rights, either by law or implication.<sup>85</sup>

**A. INTERNATIONAL DEVELOPMENT OF MORAL RIGHTS: THE EVOLUTION OF BERNE'S ARTICLE 6bis**

During the second half of the 19th century, a growing sense of the need for international protection of literary and artistic works culminated in establishment of the Berne Convention for the Protection of Literary and Artistic Works. The original text, adopted in 1886, recognized that copyright legislation should be a part of modern nations' laws, whether addressing authors' economic or moral rights. The first Berne text, adopted by the Swiss Federal Council, recognized that copyright among states should not be based on reciprocity, that no discrimination in rights should be permitted between foreign and national authors, that imposition of formalities for the "recognition and protection" of copyright in foreign works should be curbed, and "that all countries [should] adopt uniform legislation for the protection of literary and artistic works."<sup>86</sup> The first Berne text did not specifically require member nations to include moral rights provisions in their laws.

In 1928, revisions to the Berne Convention's moral rights provisions were considered at the Rome Conference. Moral rights concerns were evoked by uses of compulsory

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<sup>85</sup> See Interim VARA Report, *supra* Ch. I, note 3. In accordance with requirements in 17 U.S.C. § 106A, the Register stated that:

[T]he Office will prepare an overview of the laws of other member countries of the Berne Convention. This international overview should shed light on attitudes toward moral rights provisions, but will focus on whether, and to what degree, those rights should be alienable or waivable.

*Id.* at 13.

<sup>86</sup> See ACTES DE LA CONFERENCE REUNIE A ROME Du 7 Mai au 2 Juin 1928.



licenses, unattributed use of works in the public domain, and development of new technologies such as phonorecords, radio and motion pictures.<sup>87</sup>

The Conference adopted the following language for Article 6bis:

- (1) Independently of the author's copyright, and even after transfer of the said copyright, the author shall have the right to claim authorship of the work, as well as the right to object to any distortion, mutilation, or other modifications of the said work which would be prejudicial to his honor and reputation.
- (2) The determination of the conditions under which these rights shall be exercised is reserved for the national legislation of the countries of the Union. The means of redress for safeguarding these rights shall be regulated by the legislation of the country where protection is claimed.<sup>88</sup>

The Conference expressed the view that the issue of duration should be taken up at the next Conference.<sup>89</sup>

The Brussels Conference for the revision of the Berne Convention was held June 5th - 26th, 1948, and addressed the dual issues of balancing and author's moral rights with legitimate commercial interest of licensees and the posthumous duration of an author's moral rights.<sup>90</sup>

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<sup>87</sup> S. LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 72 (1938).

<sup>88</sup> *Id.* at 338 (translation by Copyright Office).

<sup>89</sup> *Id.* at 349.

<sup>90</sup> CONFERENCE DE BRUXELLES, *PROPOSITIONS AVEC EXPOSES DES MOTIFS, PREPARED PAR L'ADMINISTRATION BELGE ET LE BUREAU DE L'UNION* [BRUSSELS CONFERENCE, PROPOSED REVISIONS WITH COMMENTARY THEREON PREPARED BY THE BELGIAN GOVERNMENT AND THE BUREAU OF THE UNION] 42 (Jan. 1947).

After much debate, a delicate balance was struck between the standards of the Convention and the national laws of its members. The moral right was divided into the right of the author during his lifetime, as a treaty right, and the right after the death of the author, a right as extensive as national laws would permit. The treaty right was expanded slightly to add protection against "any other action in relation to the said work" (prejudicial to the honor or reputation of the author). It reserved to domestic legislation the task of establishing conditions for the exercise of the rights mentioned in paragraph one and the safeguarding of the moral rights after the death of the author and after the termination of economic rights.<sup>91</sup> In sum, the Brussels text of Article 6bis obligated members to respect authors' moral rights during their lifetimes. After the author's death, moral right would be maintained at least until the expiration of the economic rights "insofar as the legislation of the countries of the Union permit." Paragraph three reserved to member states' the means of enforcement or redress for safeguarding moral rights.<sup>92</sup>

The government of Sweden hosted the Stockholm Conference on June 11 - July 14, 1967, with the assistance of the United International Bureau for the Protection of Intellectual Property, (BIRPI). In the view of the Swedish government, the purpose of further revising the Berne Convention was to broaden the scope of rights granted to authors and to extend

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<sup>91</sup> The proposal read:

Paragraph 2. Add, at the end of the first sentence, the words: "and for their protection after the death of the author and after the expiration of the copyright."

Brussels Conference Proposed Revisions, *supra* note 90 at 46.

<sup>92</sup> "The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed."

*Id.*

their application as much as possible, to ensure that copyright laws reflected the conditions of a modern technological society.<sup>93</sup> With respect to Article 6**bis**, the Swedish government made important substantive proposals to broaden the scope of Berne protection including requiring member states to maintain moral rights at least until an author's economic rights expired.<sup>94</sup>

The final formulation required members to maintain an author's moral rights for at least the term of his or her life, subject to a qualification that countries whose laws at the time of their accession to Berne did not protect moral rights posthumously could provide that some of these rights cease at the author's death.

On July 14, 1967, the Conference adopted the following text of Article 6**bis**:

- (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.
- (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation at the moment of

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<sup>93</sup> 1 COMMISSION PRINCIPALE, CONFERENCE DE STOCKHOLM DE LA PROPRIETE INTELLECTUELLE [1 MAIN COMMITTEE, INTELLECTUAL PROPERTY CONFERENCE OF STOCKHOLM] S/1/V/NO. 1 AT 2 (1967).

<sup>94</sup> Id. at 34. Proposals for Revising the Substantive Copyright Provisions No. 1.  
"(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the person or institutions authorized by the legislation of the country where protection is claimed."

their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph, may provide that some of these rights may, after his death, cease to be maintained.

- (3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.<sup>95</sup>

The substantive provisions (Articles 1-20) of the Stockholm Act of 1967 did not enter into force immediately because they were to be reviewed in the Paris Revision in July 1971. The Paris Revision adopted the Stockholm text of Article 6bis without any changes or modifications.<sup>96</sup> The Paris Act of 1971 entered into force on October 10, 1974, and continues to protect the rights of authors and proprietors by establishing standards that members must adhere to and leaving those standards to member nations' laws.<sup>97</sup>

The 117 countries of the Berne Convention are required to provide the minimum rights specified in Article 6bis.

## **B. THE FOREIGN EXPERIENCE: STATUTES AND CASES REGARDING WAIVER OF MORAL RIGHTS**

### **1. Background**

While debating legislation to protect the works of certain visual artists, Congress discussed the implications of introducing a moral rights provision into the United States law,

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<sup>95</sup> 2 MAIN COMMITTEE, INTELLECTUAL PROPERTY CONFERENCE OF STOCKHOLM S/MISC/21 at 6-7 (1967).

<sup>96</sup> Id.

<sup>97</sup> See supra text accompanying note 32.

which is based on economic rights.<sup>98</sup> Congress wanted to create additional legal protection for certain authors' works, without hampering the works' economic viability. They were faced with the question of how to fit a new "moral right" into U.S. copyright law, and whether this right should be absolute or should be tempered by language regarding term, waiver, or transfer. One way to balance the grant of moral rights with economic rights was to insert a waiver provision into VARA, to allow authors to waive the rights of integrity and attribution by signing a specific writer instrument. Those favoring an absolute moral right and opposing any waiver provision argued that the imbalance in the economic bargaining power of parties involved in arts agreements would force authors to sign waivers of 106A rights if waiver were available, and render the grant of moral rights meaningless in the real world.<sup>99</sup> Early versions of the bill did not permit waiver of VARA rights; the final product did.<sup>100</sup>

Congress had reviewed existing protection akin to moral rights before adhering to Berne and before enacting VARA; in doing so, it examined the moral rights protection that existed in other countries. In its study of the operation of the waiver provisions included in VARA, the Copyright Office determined that other countries' recognition of authors' moral

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<sup>98</sup> See e.g., Hearings on VARA, *supra* note 40; S. 1198, 101st Cong., 1st Sess. (1989); H.R. 2690, 101st Cong., 2d Sess. (1990).

<sup>99</sup> 17 U.S.C. § 106A(e).

<sup>100</sup> H.R. Rep. No. 514, 101st Cong., 2d Sess. 18 (1990).

rights and experience and practices in regard to waiver of these rights would be useful information to report to Congress.<sup>101</sup>

The Office, therefore, decided to survey the statutes and available case law of selected countries to see how courts in those countries considered waiver of authors' moral rights in the context of visual arts, regardless of whether such waiver was direct or indirect. Because the Office wanted to provide a diverse sampling of legal systems, it selected countries with both common law and civil law backgrounds. It also attempted to gather information on countries that did not belong to the Berne Convention. Significantly, when the Office began this study, neither Singapore nor Nigeria belonged to the Berne Convention for the Protection of Literary and Artistic Works. Nigeria has since joined Berne.

As discussed below, the extent of moral rights protection and waiver varies from country to country. Some of this variance may be attributed to whether a country has civil or common law roots and when it joined the Berne Convention; the rest is probably due to the unique way in which law developed in that particular country.<sup>102</sup>

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<sup>101</sup> In its Notice of Inquiry regarding the VARA study, the Office asked for information and comments on questions including "Should the Office conduct surveys of artists' rights in foreign countries, particularly France, Germany, and Great Britain?" 57 FR 24659 (June 10, 1992).

<sup>102</sup> The Copyright Office study does not provide an extensive discussion of the development of moral rights in civil law and common law countries. For such a discussion, see Adolph Dietz, The Moral Right of the Author: Moral Rights and the Civil Law Countries, 19 COLUM.-VLA J.L. & ARTS 199 (1995); Gerald Dworkin, The Moral Rights of the Author: Moral Rights and the Common Law Countries, 19 COLUM.-VLA J.L. & ARTS 229 (1995).

## 2. Moral Rights of Visual Artists: International Survey and Comparison

a. Argentina. Argentina is a former Spanish colony and has been a member of the Berne Convention since 1967. The Argentine Constitution provided the basis for copyright protection in that country.<sup>103</sup> Argentina's Civil Code does not contain specific provisions governing moral rights. However, Argentina's Copyright Act recognizes moral rights of integrity and paternity in Articles 51 and 52, under a chapter titled "Sale," which addresses alienation and assignment of works.<sup>104</sup> Article 51 provides that "the author or his successors in title may alienate or assign the work totally or partially."<sup>105</sup> Alienation involves transfer of the right to exploit a work economically; however, "the assignee shall not be entitled to alter the title, form or contents of the work."<sup>106</sup> Thus, the author's right to integrity is protected.

Article 52 provides that if an author sells or transfers his or her rights in a work, "he retains the right to require faithful adherence to its text and to its title when printed, copied or reproduced; he also retains the right to require the mention of his name or pseudonym, as author."<sup>107</sup> An author's rights to paternity and integrity are protected here, although in the context of printed, textual works.

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<sup>103</sup> Miguel A. Emery, Argentina, in INTERNATIONAL COPYRIGHT LAW AND PRACTICE (Melville B. Nimmer & Paul E. Geller eds., 1989) § 1 at ARG-7 [hereinafter NIMMER & GELLER].

<sup>104</sup> Law No. 11.723 on Copyright [as amended to January 15, 1973] reprinted in 1 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1992).

<sup>105</sup> Id. at Art. 51.

<sup>106</sup> Id.

<sup>107</sup> Id. at Art 52.

Neither Article 51 nor Article 52 addresses waiver of rights. The articles cover transfer of copyright in a work and reproduction rights. The issue of waiver is treated only in the context of an author's ability revocably to waive his right to credit for authorship of a work by allowing it to be published anonymously.<sup>108</sup> Argentine case law precludes transfer of moral rights except upon the death of the author, although this principle does not find support in legislation.<sup>109</sup>

b. **Australia.** Australian copyright law<sup>110</sup> has its roots in English common law and emphasizes economic rights rather than personal moral rights. Australia has been a member of the Berne Convention since 1928 and as Australian law develops, it has begun to address moral rights issues. While the law does not specifically grant authors moral rights, it does describe duties owed to certain defined categories of authors. These duties protect an author's right to attribution to a work, and the right not to be named as author of a reproduction or an altered work.<sup>111</sup> Remedies for violation of these rights or duties are provided by statute.<sup>112</sup> The law leaves important moral rights to the vehicle of

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<sup>108</sup> NIMMER & GELLER, supra note 103, § 7 at ARG-54.

<sup>109</sup> C.N.Civ., Sala D, Feb. 28, 1957, L.L. 86-649; C.N.Civ., Sala C, Sept. 9, 1978, E.D. 81-170. See Nimmer & Geller, supra note 103, § 7 at ARG-53.

<sup>110</sup> An Act Relating to Copyright, and for other purposes (as amended to May 26, 1987), reprinted in 1 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1987).

<sup>111</sup> Id. §§ 190, 191, 193.

<sup>112</sup> Id. §§ 194, 195.



contract, including the right of withdrawal, the right to claim authorship, and the right to prevent destruction or distortion.<sup>113</sup>

In 1984, the Australian Copyright Council pointed out that "[b]ecause of artists' inferior bargaining power, it would appear that moral rights will only be of practical benefit if they are not subject to waiver."<sup>114</sup> However, the observation was not taken to heart by legislators who were convinced that practical reasons mandated making moral rights waivable.<sup>115</sup>

In 1988, the Australian Copyright Law Revision Committee published a report in which it concluded (5-4) that its existing laws which were virtually identical to English common law provided sufficient moral rights protection to comply with Berne and that there was no need to enact specific moral rights legislation.<sup>116</sup> Australia reviewed this subject again when the government issued a discussion paper titled "Proposed Moral Rights Legislation for Copyright Creators" in 1994. The paper proposed a new moral rights system

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<sup>113</sup> James Lahore, Australia, in Nimmer & Geller, supra note 103, § 7 at AUS-77.

<sup>114</sup> "Moral Rights," 50 AUSTRALIA COPYRIGHT COUNCIL 15 (1984).

<sup>115</sup> David Vaver, The Canadian Copyright Amendments of 1988, 4 INTELLECTUAL PROPERTY JOURNAL 130 n. 30 (1989).

<sup>116</sup> Dworkin, supra note 102, at 239. One distinguished scholar has challenged this view and stated that Australia currently stands in breach of Article 6bis "in so far as the right to claim authorship is only partially protected and in so far as the protection accorded the rights of attribution and integrity only survive the author in very limited circumstances." Id. at 239 & n.34 (citing Sam Ricketson, Moral Rights and the Droit De Suite: International Conditions and Australian Obligations, 1 ENT. L. REV. 78, 86 (1990)).

that would afford the right of integrity and the right of attribution to authors, artists, composers and creators of films.<sup>117</sup> The paper has not yet precipitated legislative changes.

c. **Brazil.** Brazil, a former colony of Portugal and a civil law country, adhered to the Berne Convention in 1967.<sup>118</sup> Brazilian copyright law respects both moral and economic rights in an author's work. Part III, Chapter Two of the copyright law<sup>119</sup> is devoted to "The Moral Rights of the Author." Article 25 states that an author has the rights to: (1) claim authorship of his/her work at any time; (2) have his/her name, pseudonym or mark indicated as being that of the author of a work; (3) withhold publication of his/her work; (4) ensure the integrity of the work by opposing modifications or acts that may be prejudicial to it or to the author's reputation; (5) modify the work before or after its use; and (6) withdraw the work from circulation or suspend previously authorized permissions for use.<sup>120</sup>

Article 28 of the Brazilian Copyright Act clearly states that the moral rights of the author are "untransferable, and imprescriptible." Regarding alienability and waiver of rights, one author writes that former law permitted transfer of a claim to authorship, but that situation has changed:

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<sup>117</sup> See Shaun McVicar, Proposed Moral Rights in Australia, 43 COPYRIGHT WORLD 7-8 (1994).

<sup>118</sup> Antonio Chaves, Brazil, in Nimmer & Geller, supra note 103, § 1 at BRA-7-8.

<sup>119</sup> Civil Code of the United States of Brazil [as amended to Sept. 12, 1983], reprinted in 1 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1992).

<sup>120</sup> Language expressly covering the exercise of moral rights in cinematographic works is contained in Article 26, and rights in architectural works are treated in Article 27.

Moral right is not alienable, though it may be partially waived in special cases, notably by means of an author's authorization to adapt, say, a literary work into a motion picture or for the stage. (Footnote omitted). Article 667 of the Civil Code nonetheless seems to allow for outright transfer of the author's moral right to credit for authorship; but that provision was ostensibly inserted against the overall system of the Civil Code, and its nonvalidity no longer raises any doubts in view of Article 28 of the 1973 Copyright Act. (Footnote omitted).<sup>121</sup>

Despite the clear language of Article 28, transfers are permitted in the sense that in Brazil the moral rights and the economic rights in a work are bound together. Thus, moral rights can pass to a transferee along with the economic aspects of a copyright, for example, by a contract covering creation of a derivative work. Action can be taken against the transferee if a court finds that the resulting work prejudiced the integrity of the original work or if it adversely affected the author's honor or reputation.<sup>122</sup> Courts make such determinations on a case-by-case basis.

d. **Canada.** Canadian copyright is largely modeled on English common law, but has also been influenced by French civil law. Canada has been a member of the Berne Convention since 1928. Canada's recent copyright act contains moral rights

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<sup>121</sup> NIMMER & GELLER, *supra* note 103, § 4 at BRA-41.

<sup>122</sup> *Id.* § 7 at BRA-84.

provisions.<sup>123</sup> Those provisions are contained in sections 14.1, 14.2, 28.1, and 28.2. One author notes that:

[w]hile these provisions seem to clarify and significantly extend Canada's protection of moral rights, [the new] laws still fall midway between the extensive protection available under the 'paradigm' French Law of 1957 and the ad hoc mix of common law and statutory regimes developed in the United States and Britain.<sup>124</sup>

Current rights allow the author of a work to:

- 1) assert paternity of the work or require the author's name to be associated with the work if reasonable in the circumstances;<sup>125</sup>
- 2) object to or restrain certain uses of or associations with a work;<sup>126</sup> or
- 3) object to or restrain any distortion, mutilations or modification of a work which may be prejudicial to the honor or reputation of the author.<sup>127</sup>

Article 14.1(2) states that moral rights may not be assigned but may be waived in whole or in part. Article 14.1(3) states that assignment of copyright in a work does not itself

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<sup>123</sup> "An Act to amend the Copyright Act and to amend other Acts in consequence thereof," S.C. 1988, c. 15 [now R.S.C. 1985 (4th Supp.), c. 10]. Recent amendments to the Copyright Act came into force January 1, 1994, with the North American Free Trade Agreement Implementation Act, S.C. 1993, c.44.

<sup>124</sup> Jeff Berg, Moral Rights: A Legal, Historical and Anthropological Reappraisal, 6 INTELLECTUAL PROPERTY JOURNAL 343 (1991).

<sup>125</sup> 1995 Annotated Copyright Act of Canada §14.1(1)(1995).

<sup>126</sup> Id. §28.2.

<sup>127</sup> Id.

constitute a waiver of moral rights. Article 14.1(4) implies that waivers would be in written form.<sup>128</sup>

Moral rights issues have not often been litigated in Canada; but when parties have sued, their claims have generally failed.<sup>129</sup> Waiver generally has not been an issue in cases except as a defense against charges of violation of rights of integrity or paternity. An early, well-known Canadian case involved violation of an author's moral rights in a sculpture. The plaintiff/author in Snow v. Eaton Centre sought to enjoin the violation of the sculptor's moral rights in the work known as "Flight Stop." The defendant/shopping mall that owned and displayed the work added ribbons to the necks of the geese portrayed by the sculpture in order to create a Christmas display. The court found that the attached ribbons prejudiced the honor and reputation of the plaintiff. The plaintiff had no prior knowledge that ribbons would adorn the sculpture, and there was no contract covering the situation. The author of the copyrighted work prevailed on claims of prejudice to honor and reputation. No waiver of rights was claimed either under contract law or moral rights statutes.<sup>130</sup>

e. **Federal Republic of Germany.** Germany has been a member of Berne since 1887 and would be considered a civil law country. The German theory of law, however, is monistic, meaning that copyright law protects both an author's economic and

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<sup>128</sup> See also "The waiver of a right is a legal act whereby a person renounces the exercise of one of his prerogatives. To be valid, it must be expressed in clear and unequivocal terms and based on enlightened consent." Id. 14.1(2) (Comment).

<sup>129</sup> Vaver, supra note 115, at 127.

<sup>130</sup> Snow v. Eaton Centre Ltd., 70 C.P.R. (2d) 105 (Ont. H.C.)(1982).

personal interests at the same time. German monism requires the alignment of moral, personal rights relating to cultural pursuits with contractual, industrial property rights relating to technological advance, in order to fit a unified legislative scheme.<sup>131</sup> The German Copyright Law<sup>132</sup> essentially contains four elements: copyright law, contract law, neighboring rights law, and the law of the collecting societies.<sup>133</sup> In the German system, the original copyright owner is always the natural person who creates a work; commissioned works and works made for hire must be created in the context of a legal contract.<sup>134</sup>

Copyright as a whole is not assignable, but rather is subject to individual grants of simple or exclusive rights of use. Moral rights pervade many articles in the Copyright Act and specific provisions are set forth. As amended June 9, 1993 they are:

- 1) The right to decide whether and how the author's work is to be published. The author shall have the right to publicly communicate or describe the content of his work for as long as neither the work nor its essence nor a description of the work has been published with his consent.<sup>135</sup>
- 2) The right of recognition of authorship in a work. The author may determine whether the work is to bear the author's designation and what designation is to be used.<sup>136</sup>

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<sup>131</sup> Berg, supra note 124 at 352. For a comparison of French dualism and German monism see Dietz supra note 102 at 206-213.

<sup>132</sup> An Act dealing with Copyright and Related Rights (as amended to June 9, 1993), reprinted in 2 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1993).

<sup>133</sup> Adolf Dietz, Germany, Federal Republic, in NIMMER & GELLER, supra note 103, at FRG-15.

<sup>134</sup> Id. § 1 at FRG-15.

<sup>135</sup> Copyright Act of Federal Republic of Germany, supra note 132, at Art. 12.

<sup>136</sup> Id. at Art. 13.

- 3) The right to prohibit any distortion or any other mutilation of the author's work which would jeopardize his legitimate intellectual or personal interest in the work.<sup>137</sup>

The right of recognition of authorship in a work includes both the positive right to claim authorship and the negative right to prevent others from claiming authorship.

Protection of the right of integrity depends upon the existence of provable and objective injury either to an author's honor or reputation, or to any other legally protectable interest in his or her work. These conditions allow courts to use their judgement in deciding whether a modification is significant or whether the author is being oversensitive.<sup>138</sup>

Whether or not an author may transfer moral rights is not clearly defined. Moral rights are generally retained by the author for a term of the life of the author plus 70 years, but economic aspects of copyright may be licensed.<sup>139</sup> It appears that if an author waives his or her moral rights, and later brings a legal action, a court will weigh the parties' interests in light of practicality and fairness. If the agreement to waive rights was coerced, a court will protect the author. If not, a contract will be honored. Moral rights laws are recognized as an equalizer of the inherent imbalance in bargaining position between artists and commercial exploiters of copyrighted works.

Case law rarely deals with waiver of moral rights in authors' works. A general indication of courts' treatment of moral rights appears in a case involving a sculptor who

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<sup>137</sup> *Id.* at Art. 14.

<sup>138</sup> See NIMMER & GELLER, *supra* note 103, § 7 at FRG-85-86.

<sup>139</sup> Copyright Act of Federal Republic of Germany, *supra* note 132, at Art. 64.

produced a work during the communist regime for display in Berlin. In light of the changes in world politics, the reunified city decided to dismantle the statue and preserve it for future generations by burying it -- not destroying it, but dismantling it and placing it underground.<sup>140</sup> The sculptor objected, relying on the provision of the German Copyright Act which states that an author may prohibit representation or other injury to a work that may prejudice his legal or personal interests.<sup>141</sup>

The court ruled that the author's interests were outweighed by the interests of the city, because the work had originally been erected for propaganda purposes to glorify Lenin. An implied contractual provision, which linked the author to the objectives of the former regime, forced him to accept the effects of historical change. Damage resulting from the dismantling would be evidence of the history of the monument, not a sign of diminished artistic quality.<sup>142</sup>

f. **France.** France has been a member of the Berne Convention since 1887 and is generally considered the birthplace of the droit moral. French courts began protecting moral rights in the early nineteenth century, and a strong embodiment of the doctrine is codified in the Law on the Intellectual Property Code.<sup>143</sup> Under the French

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<sup>140</sup> 23 COPYRIGHT WORLD 12 (1992).

<sup>141</sup> Copyright Act of Federal Republic of Germany, supra note 132, at 14.

<sup>142</sup> 23 COPYRIGHT WORLD 23 (1992).

<sup>143</sup> Law No. 92-597 of July 1, 1992, as last amended by Law Nos. 94-361 of May 10, 1994, and 95-4 of January 3, 1995, reprinted in 1 WIPO, COPYRIGHT AND NEIGHBORING RIGHTS LAWS AND TREATIES (1995).



dualistic approach, copyright has the legal attributes of both moral, or personal rights, and economic rights.

The French copyright law states that:

The author shall enjoy the right to respect for his name, his authorship, and his work. This right shall be attached to his person.

It shall be perpetual, inalienable and imprescriptible.

It may be transmitted mortis causa to the heirs of the author.

Exercise of this right may be conferred on another person under the provisions of a will.<sup>144</sup>

Both the work and the author's honor and reputation are protected by these provisions. Moral rights in France cover the right of disclosure, the right to paternity, the right to correct or to retract, and the right to respect, which prohibits modification of a work by anyone other than the author. Moral rights are inalienable, imprescriptible and perpetual, although courts have held that authors may not exercise their rights abusively, or in a way that impairs public policy.<sup>145</sup> At the same time, courts may indirectly recognize violation of moral rights within the context of misuse of law, upholding public policy, preventing abuse to the detriment of third parties, or impairment of interests granted to others in an author's work.<sup>146</sup>

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<sup>144</sup> *Id.* at Art. L. 121-1.

<sup>145</sup> Robert Plaisant, France, in NIMMER & GELLER, supra note 103, § 7 at FRA-82.

<sup>146</sup> *Id.* A French appellate court resolved a conflicts of law question regarding moral rights in motion pictures in Turner Entertainment Co. v. Huston, Court of Appeal of Versailles, Combined Civil Chambers, (continued...)

The author alone has the right to divulge his or her work.<sup>147</sup> The author is the person with the right to determine the method of disclosure and the conditions surrounding disclosure of his or her work, subject to some restrictions in the case of audiovisual works.<sup>148</sup> Agreements about anonymity or concealed collaboration, which may be made by contract, or may be considered as implied waiver, are legal but revocable. The author may disclose his authorship at any time.<sup>149</sup>

Waiver was an issue in a case regarding copyright in plaintiff's television film.<sup>150</sup> The plaintiff was the author of a film, and negotiated with a television station to air the film on TV. During negotiations, the plaintiff objected not only to the interruption of the film by advertisements, but also to the station's logo being over the film during its showing. The station showed the film in its entirety a few weeks later, but with its logo appearing prominently on the screen. The plaintiff sued. The court held that the defendant infringed the moral rights of the plaintiff because the plaintiff did not expressly authorize the addition of the logo and, in fact, had expressly objected to it. The court stated that the author of a

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<sup>146</sup>(...continued)

Decision No 68, Roll No 615.92 (December 19, 1994). As part of a long-pending case brought by screenwriter Ben Maddow and the heirs of director John Huston over the broadcast of a colorized version of the film "Asphalt Jungle" in France, France's highest court held that French law, not U.S. law, should be applied in deciding who is the "author" of a film. On remand, an appellate court found the colorization and broadcast of the film violated the authors' moral rights under French law. Under U.S. law, Turner, as copyright owner and "author" of the work, would have been allowed to "adapt" the film.

<sup>147</sup> Copyright Act of France, supra note 143, at Art. L. 121-2.

<sup>148</sup> Id.

<sup>149</sup> A. Schmidt, The Case-Law Application of the Law of 11 March 1957, 84 RIDA 96 (1975).

<sup>150</sup> Jean-Pierre Marchand and Societe Des Realisateurs de Films v. La Cinq S.A., [1990] EEC 151 at \* 13 (Dist. Ct. Paris 29, June 1988) (LEXIS Intlaw library, ECCASE file).

copyright cannot be presumed to have waived his moral rights, and the station cannot infer that the rights were waived from the fact that no one else had ever complained about the overlaying of the station's logo on films.

g. **Japan.** Japan has been a member of the Berne Convention since 1899. Current Japanese copyright law<sup>151</sup> protects authors' copyrights, moral rights, and neighboring rights.<sup>152</sup> The law protects an author's right to make a work public, the right to claim authorship, and the right of integrity.<sup>153</sup> Fair use provisions and compulsory license provisions, which may be viewed as eroding an author's moral rights, are contained in the Copyright Act,<sup>154</sup> but Article 50 of the law states that these provisions may not "be construed to affect the protection of the moral right of authors."<sup>155</sup> Civil remedies for infringement of an author's moral rights, copyright, or any neighboring right are provided under chapter six of the Copyright Act,<sup>156</sup> and criminal sanctions for violation of rights are included in chapter seven.<sup>157</sup>

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<sup>151</sup> Copyright Law [amended to Nov. 1, 1988], reprinted in 2 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1992); amended in, 1 WIPO, COPYRIGHT AND NEIGHBORING RIGHTS LAWS AND TREATIES (1992).

<sup>152</sup> Teruo Doi, Japan, in NIMMER & GELLER, supra note 103, § 1 at JAP-5.

<sup>153</sup> Copyright Act of Japan, supra note 151, at Arts. 18-20.

<sup>154</sup> Id. at Arts. 30-49.

<sup>155</sup> NIMMER & GELLER, supra note 103, § 7 at JAP-41.

<sup>156</sup> Copyright Act of Japan, supra note 151, at Arts. 112-18.

<sup>157</sup> Id. at Arts. 119-24.

Transfer is not permitted. Article 59, "Inalienability of moral rights", states that the moral rights of the author shall be exclusively personal to an author and inalienable.<sup>158</sup>

Article 20(1) gives an author "the right to preserve the integrity of his work and its title against any distortion, mutilation or other modification against his will."<sup>159</sup>

**h. Mexico.** Mexico adhered to the Berne Convention in 1967. In Mexico's Copyright Act,<sup>160</sup> an author holds two types of rights: (1) moral rights, which include the recognition of authorship and the rights to oppose any deformation, mutilation, or change of the copyrighted work without authorization,<sup>161</sup> and (2) patrimonial rights to use or reproduce works for profit.<sup>162</sup> Moral rights may not be waived or assigned because they are deemed to be integral to the author, to be perpetual, inalienable, imprescriptible, and incapable of being renounced.<sup>163</sup> However, Article 5, dealing with alienation of a work, allows an author to consent to translations, compendia, adaptations and transformations of a work, in whole or in part. The resulting work may not alter the title, form or contents of the work.<sup>164</sup> Article 5 allows the author to make or authorize the making of modifications

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<sup>158</sup> *Id.* at Art. 59.

<sup>159</sup> *Id.* at Art. 20(1).

<sup>160</sup> Law Amending the Federal Law of Copyright of Dec. 29, 1956 [as amended to Dec. 30, 1981], reprinted in 2 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1992).

<sup>161</sup> *Id.* at Art. 2.

<sup>162</sup> INTELLECTUAL PROPERTY WORLD DESK REFERENCE, MEXICO-3 (Thomas M.S. Hennes ed., 1992).

<sup>163</sup> Copyright Act of Mexico, *supra* note 160, at Art. 3.

<sup>164</sup> *Id.* at Art. 5.

of his work at any time. It appears that although moral rights may not be waived, an author may consent to certain transformations of his or her work.

i. **Morocco**. Morocco has been a Berne signatory since June 1917. As a former colony of France, Morocco's copyright law and recognition of moral rights reflect the French civil law model. Article 1 of Chapter One of the Copyright Law<sup>165</sup> gives authors of intellectual works moral and economic rights in their works. Article 2 provides the ability to claim authorship in a work, and to defend the integrity of a work during an author's lifetime.<sup>166</sup> These moral rights are inalienable, as in France. Morocco's Articles 14 and 15 grant an author the right to put his or her name on reproductions of works, and to prevent unauthorized alterations of works by assignees of rights.<sup>167</sup> Waiver of rights is not addressed by statute.

j. **Netherlands**. The Netherlands has been a member of Berne since 1912 and has a civil law tradition but has not expressed the concept of moral rights in a manner comparable to civil law countries such as France, Germany and Italy.<sup>168</sup> The first Dutch copyright statutes addressed only the rights of publishers.<sup>169</sup> Later, the law was expanded

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<sup>165</sup> Dahir (Act) Relating to the Protection of Literary and Artistic Works, 1970, reprinted in 2 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1992).

<sup>166</sup> Id. at Art. 2.

<sup>167</sup> Id. at Arts. 14-15.

<sup>168</sup> Dietz, supra note 102, at 202-203.

<sup>169</sup> See NIMMER & GELLER, supra note 103, § 1 at NETH-7.

to recognize authors' rights.<sup>170</sup> The current Dutch Copyright Act<sup>171</sup> recognizes moral rights apart from the copyright protection established to protect intellectual property. Economic rights conferred by copyright can be transferred, but moral rights in an author's work may not.<sup>172</sup> Even after a transfer of copyright, an author retains the rights to object to publication of his or her work under a name other than his or her own, and the right to object to unreasonable alteration, modification, distortion or mutilation of a work when it is prejudicial to the author's reputation or honor.<sup>173</sup> An author may waive some personal rights by contract, including the right to object to publication of his work under a name other than his own, and the right to object to modification of his work.<sup>174</sup>

Two Dutch cases are instructive. One case involved an author's rights in a sculpture.<sup>175</sup> The sculptor was commissioned to make a plastic work of art to decorate the front of a building. After completion of the work, the commissioning party decided to place it in front of a different building. The sculptor alleged that a passerby would have more difficulty recognizing the sculpture at its new site than at the original setting. The court decided against the commissioning party. However, the basis of the decision was not

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<sup>170</sup> Id.

<sup>171</sup> Law Concerning the New Regulation of Copyright [as amended to May 30, 1985], reprinted in 2 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1992).

<sup>172</sup> NIMMER & GELLER, supra note 103, § 4 at NETH-33.

<sup>173</sup> Copyright Act of the Netherlands, supra note 171, Art. 25 ¶¶ (a),(b), and (c).

<sup>174</sup> NIMMER & GELLER, supra note 103, § 7 at NETH-52.

<sup>175</sup> Netherlands Supreme Court (June 22, 1973), NJ 1974, at 61.

Article 25 of the Dutch Copyright Act, which provides for authors' rights, but was, instead, contract law. The court concluded that the commissioning party did not fulfill its obligations under its contract with the artist.<sup>176</sup>

In another case,<sup>177</sup> a plaintiff was the designer and creator of a fountain constructed to the order of the defendant. After twelve years, the defendant, as owner of the fountain, decided to demolish it. The plaintiff objected, and invoked his moral right as designer. The court held that Article 6**bis** of the Berne Convention does not apply in a case of total demolition of a work. The law in the Netherlands is unclear in this area, and legal scholars are divided as to the propriety of the court's ruling.<sup>178</sup>

k. **Nigeria.** Nigeria was at one time a British colony and protectorate and its law is based on English common law. Upon independence, Nigeria recognized the need to protect the rights of authors and creators of intellectual property, and ultimately in 1988, enacted a copyright law that contains both copyright and neighboring rights provisions.<sup>179</sup> It then joined the Berne Convention.<sup>180</sup> Part I, paragraph 11 of the Copyright Decree of 1988 covers the right to claim authorship in a work, and states that a copyright owner has the rights to claim authorship in a work,<sup>181</sup> and to object to distortion, mutilation, or other

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<sup>176</sup> Id.

<sup>177</sup> Lenartz v. Municipality of Sittard (Dec. 17, 1990), AMI 1992, at 33-35.

<sup>178</sup> See 10 EUROPEAN INTELLECTUAL PROPERTY REVIEW 207 (1992).

<sup>179</sup> Law on Copyright, Decree No. 47 (1988), replacing Decree No. 61 of 1970.

<sup>180</sup> Effective September 14, 1993 (Paris).

<sup>181</sup> Supra note 179, at paragraph 11(1)(a).

derogatory modification of a work that damages the honor or reputation of the author.<sup>182</sup>

These rights are perpetual, inalienable, and imprescriptible.<sup>183</sup>

I. **Singapore.** The Republic of Singapore, formerly a part of the British Empire, is not a member of the Berne Convention, although it reached a bilateral agreement with the United States on May 18, 1987.<sup>184</sup> Part IX, Articles 187-193, of the Singapore Copyright Law<sup>185</sup> covers "False Attribution of Authorship." Under the law, there is a duty not to attribute falsely the authorship of a work,<sup>186</sup> whether in the context of affixing another person's name on a work in a publication or in a reproduction or broadcast of a work. The law also provides the duty not to attribute falsely the authorship of an altered version of a work.<sup>187</sup> The law provides remedies for breach of these duties.<sup>188</sup> Copyright may be assigned or licensed by written instrument under part X of the law, but waiver is not addressed by the statute.

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<sup>182</sup> *Id.* at paragraph 11 (1)(b).

<sup>183</sup> *Id.* at paragraph 11(2).

<sup>184</sup> See Library of Congress, U.S. Copyright Office, Circular 38a International Copyright Relations of the United States 6 (1994).

<sup>185</sup> The Copyright Act 1987, Pt. IX, Arts. 187-93, reprinted in 3 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1988).

<sup>186</sup> *Id.* at Art. 188.

<sup>187</sup> *Id.* at Art. 190.

<sup>188</sup> *Id.* at Art. 192.



m. **Spain**. Spain is a civil law country and has been a member of the Berne Convention since 1887. Spain's Copyright Law addresses moral rights<sup>189</sup> and gives an author the ability to prevent or authorize the disclosure of works, the form of disclosure of works, and the disclosure of authorship of works.<sup>190</sup> The law also covers the right to protect the integrity of works, the right to prevent distortion or mutilation of works, the right to alter works, and the right to retract works from circulation.<sup>191</sup> The Spanish law does not contain any specific language addressing waiver of moral rights.

n. **United Kingdom**. The United Kingdom is a common law country and has been a member of the Berne Convention since 1887. Although moral rights have been acknowledged in Britain, "the British have refused to accord the moral rights of the author a precedence equal to his economic rights."<sup>192</sup> As early as 1769, the English Court of Appeal recognized that because a literary work was the object of a proprietary right, the author held a right in equity allowing him to benefit from the fruits of his creative act; therefore, he possessed the right to protection against seeing his work violated by another person.<sup>193</sup>

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<sup>189</sup> Law on Intellectual Property Ch. III § 1, Arts. 14-16, reprinted in 3 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1988).

<sup>190</sup> Id. at Art. 14.

<sup>191</sup> Id.

<sup>192</sup> William R. Cornish, United Kingdom, in NIMMER & GELLER, supra note 103, § 1 at U.K.-9.

<sup>193</sup> NORMAND TAMARO, THE 1995 ANNOTATED COPYRIGHT ACT 78 (1995) (discussing Millar v. Taylor, 4 Burr. 2303, 98 Eng. Rep. 201 (1769 K.B.)).

The Copyright Act of 1956 did not include the right of attribution or the right of integrity, but it did recognize the tort of misattribution.<sup>194</sup> This limited protection was legislated to enable the United Kingdom to ratify the Brussels text of the Berne Convention.<sup>195</sup> Further weight was added to the assertion that moral rights should be recognized in the copyright law when the Whitford Committee endorsed this concept in 1977.<sup>196</sup> Following this recommendation, the British sought a solution that would balance the rights of the user, generally protected by contract, with the rights of authors.<sup>197</sup> In 1988, the law was updated to define: the right to be identified as author or director (paternity), the right to object to derogatory treatment of a work (integrity), the right against false attribution of a work, and the right to privacy in private photographs and films.<sup>198</sup> These rights are inalienable under the law, but a person may waive any of the rights by means of a written instrument.<sup>199</sup> The right of paternity must be asserted by a statement assigning copyright, or by any other signed instrument.<sup>200</sup> If paternity is asserted in an

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<sup>194</sup> WILLIAM R. CORNISH, WORLD INTELLECTUAL PROPERTY GUIDEBOOK: UNITED KINGDOM 345 (1991).

<sup>195</sup> Id.

<sup>196</sup> Cornish, supra note 194, at 345.

<sup>197</sup> Id.

<sup>198</sup> Copyright, Designs and Patents Act 1988, reprinted in 3 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1988).

<sup>199</sup> See Ian Blackshaw, Sports Marketing and Moral Rights in the UK, 31 COPYRIGHT WORLD 40 (1993).

<sup>200</sup> The requirement that the paternity right be asserted actively in order to be recognized very likely violates the spirit, if not the letter, of the Berne Convention.

assignment, the agreement binds the assignee and anyone claiming through him with or without notice. The right of integrity need not be affirmatively asserted to be effective. This right may be waived; however, in order to protect an author from alterations that would prejudice his honor or reputation, it must be waived specifically and unequivocally. A boilerplate contract clause waiving an author's right of integrity is not enforceable.<sup>201</sup> The right against false attribution need not be asserted affirmatively to be effective.

Section 87 of the law specifically addresses consent and waiver of rights. It states that moral rights granted to authors are not infringed if the author consents to an act that would normally violate the author's rights.<sup>202</sup>

In addition, a waiver may relate to a specific work or works, or to a general class of works existing or yet to be created.<sup>203</sup> A waiver may be conditional or unconditional and may be subject to revocation.<sup>204</sup> Although waivers should be in writing to be legally enforceable, section 87(4) addresses oral or implied waiver, stating that nothing in the law "shall be construed as excluding the operation of the general law of contract or estoppel in relation to an informal waiver or other transaction" in relation to moral rights granted by the copyright law.<sup>205</sup>

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<sup>201</sup> Cornish, supra note 194, at 346-347.

<sup>202</sup> Supra note 198, at Sec. 87(1).

<sup>203</sup> Id. at Sec. 87(3)(a).

<sup>204</sup> Id. at Sec. 87(3)(b).

<sup>205</sup> Id. at Sec. 87(4).

The incorporation of moral rights into the U.K. law contains important qualifications. Section 81, which addresses exceptions to the moral right, states, in part, that the right to object to derogatory treatment of a work<sup>206</sup> does not apply to a computer program or to a computer-generated work;<sup>207</sup> to any work made for the purpose of reporting current events;<sup>208</sup> to a work published in a newspaper, magazine or similar periodical;<sup>209</sup> or to a collective work of reference.<sup>210</sup> This may reflect the efforts of publishers and software operators to remain immune from applications of moral rights laws for authors in highly commercial or work-made-for-hire situations.

The following case was never tried because the parties settled before going to court.<sup>211</sup> It does, however, serve as an example of an English court's treatment of moral rights. In this case, a well known and respected artist was commissioned to paint a mural on four stories of a new architectural center. The mural was to be visible in its entirety through a wall of glass, and was to be the focal point of the neighborhood's revitalization program. Three months before the Queen was to preside at the opening ceremony for the center, local licensing magistrates insisted that partitions be placed throughout the building, which would

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<sup>206</sup> Id. at Sec. 80.

<sup>207</sup> Id. at Sec. 81(2).

<sup>208</sup> Id. at Sec. 81(3).

<sup>209</sup> Id. at Sec. 81(4)(a).

<sup>210</sup> Id. at Sec. 81(4)(b).

<sup>211</sup> See Nicola Solomon & David Mitchell, Moral Rights - A Case Study, 141 NEW LAW JOURNAL 1654 (1991).

cause the mural to be obstructed. Although the artist's commission was not affected, she sought legal recourse. Her contract included language that protected her moral rights. In the United Kingdom, contractual provisions stand apart from statutory moral rights provisions and usually provide a stronger basis for enforcing a claim based on the integrity of one's work.<sup>212</sup>

The artist's attorney advanced a claim based both on the statutory provisions protecting moral rights and on the contractual provisions outlined in the artist's signed contract. Finally, the parties negotiated an agreement whereby the center's management group and architect consented to build a less obtrusive barrier. The plan was accepted by the magistrates, who were under considerable pressure from the parties.

These facts led one commentator to note that the new law appears to "venture little farther than its common law forebears,"<sup>213</sup> a comment directed to the fact that the artist's attorney had to rely on the contractual provisions rather than the specific statutory recognition of the validity of the law of contract or estoppel in cases of informal waiver.<sup>214</sup>

**o. European Union.** The European Union (EU) is attempting to harmonize many types of laws, including intellectual property laws, among its member nations. These efforts have met with varying success.<sup>215</sup> The EU has not passed a

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<sup>212</sup> Id.

<sup>213</sup> Id.

<sup>214</sup> Id.

<sup>215</sup> See Jeff Clark-Meads, Copyright Reform Sweeps Across Europe, 107 BILLBOARD 3 (April 8, 1995).

directive on the subject of moral rights in copyright laws.<sup>216</sup> However, as announced in its working program,<sup>217</sup> there has been discussion of the need to harmonize member nations' laws in the areas of copyright protection and certain other related rights.<sup>218</sup> The organization stated that moral rights "are a set of rights based on the fact that a work is the reflection of the author's personality".<sup>219</sup> It said that the Commission of the European Communities wants to get "as accurate a picture as possible of the problems associated with moral rights and of whether this aspect of the copyright should be harmonized."<sup>220</sup> A hearing was held at which interested parties could discuss controversial points, and add comments to written views they had submitted to the Commission. This matter is now pending.

### C. SUMMARY

The Berne Convention addresses moral rights in the nonextensive text of Article 6**bis**, which does not address waiver of the *droit moral*. Waiver is neither sanctioned nor prohibited by 6**bis**, and the issues of transfer and assignment are not covered.

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<sup>216</sup> An EU directive is binding on member states. They must achieve the goal of the directive, although the method of doing so is not dictated. Each member state may decide the form and method in which to implement and enforce a directive. See 13 INTERNATIONAL MEDIA LAW 30 (April 1995).

<sup>217</sup> See P(90)97 of December 5, 1990, cited in Press Release; 1P:93-1 (January 4, 1993).

<sup>218</sup> The Council of the European Communities issued a directive on harmonization which contains Article 9, **Moral Rights**. The text of Article 9 is brief: "This Directive shall be without prejudice to the provisions of the Member States regulating moral rights." Council Directive 93/98/EEC (October 29, 1993).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

As briefly outlined above, differences in views on rights and on legal systems meant that by the time 6bis was added it was necessary to allow member nations to implement the tenets of the Berne Convention within the frameworks of their own legal structures, whether by statutory implementation, recognition under case law, or both.<sup>221</sup>

Berne member nations typically provide statutory recognition of some of the commonly recognized moral rights for authors, including the rights of attribution, integrity or paternity. As briefly detailed in this report, even Berne members with the same basic legal systems do not have identical views on moral rights. Civil law countries, such as France and Spain, have a commitment to provide rights that are absolute, personal, and actionable at the author's discretion. Other civil law countries may not express this commitment so positively, and there has been resistance to integrating personal rights with economic considerations in common law countries such as the United Kingdom, Canada, and Australia. Our survey notes that Argentina indirectly grants rights of integrity and paternity in its copyright law; it imposes certain duties by directing its citizens not to perform certain acts affecting attribution of authorship in works. Broader recognition of moral rights, running from somewhat modest to almost absolute, can be found in the laws of the United Kingdom, Canada, Germany, Japan, Mexico, Morocco, the Netherlands, Nigeria, Spain, France, and Brazil.

The need to balance the interests of authors with those of owners and users of copyrights demands the flexibility that Berne allows. The decision as to who has rights to expose an author's work to the public, and in what fashion, involves personal interests of the

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<sup>221</sup> See Adolf Dietz, The Artist's Right of Integrity Under Copyright Law - A Comparative Approach 25 INTERNATIONAL REVIEW OF INDUSTRIAL PROPERTY AND COPYRIGHT LAW 177 (1994).

creator and important economic interests of the copyright owner. Exploitation rights, most often governed by contract law, may conflict with the artistic or moral concerns an author possesses. As one author has written, "The simple fact is that moral rights impinge upon economic activity and, where they exist, cannot be ignored...industry hostility, to unqualified moral rights...cannot simply be dismissed."<sup>222</sup>

Waiver of moral rights is usually not directly addressed by statute. In our survey, we found specific language that allows waiver of certain moral rights only in the statutes of the common law countries of the United Kingdom and Canada, where the personal rights of attribution or paternity, and integrity, though addressing the relationship of the artist and his or her work, must in some cases be asserted by an artist or his or her heirs in order to be recognized.<sup>223</sup> In other countries, these rights are often declared by statute to be exclusive, inalienable, perpetual, and imprescriptible, qualities that do not, in theory, lend themselves to waiver.

It is likewise difficult to find cases that directly address waiver of moral rights. In France, Japan, Brazil, the Netherlands, and Germany, courts have found what amounts to waiver by employing theories of implied waiver or contractual assent. In countries such as Australia and Canada, a party seeking to address perceived violation of his or her right to

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<sup>222</sup> Dworkin, supra note 102, at 263.

<sup>223</sup> See supra text accompanying notes 192-213 (discussing copyright law of United Kingdom).



integrity may seek a remedy in the form of an injunction.<sup>224</sup> Thereafter, parties may settle out of court, putting an end to further discussion on the record. In addition, other remedies may be available outside the copyright law, such as remedies for unfair competition or passing-off.<sup>225</sup> In some instances, copyright law and moral rights protection are separate: economic rights may be waived, but moral rights may not.<sup>226</sup>

The difficulties encountered by any country trying to initiate moral rights protection for its authors and artists arise from the need to balance protection of such authors' rights with protection of copyright owners' rights and the need to allow for a practical system of contractual consent or waiver. Depending upon the socio-economic and ideological underpinnings of a country's law, the scales tilt in favor of either the author or the user of the work. Generally, moral rights are not absolute under any system, but are in some way tempered by the economic exploitation rights of the owner or proprietor.

One commentator suggests that all moral rights legislation should have as a central "that authors should not be allowed to act unreasonable."<sup>227</sup> He also notes the need in both

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<sup>224</sup> In Australia, the "relief that a court may grant in an action [for breach of duty] includes an injunction (subject to such terms, if any, as the court thinks fit) and damages." Copyright Act of Australia, *supra* note 110, § 194(2). In Canada's well-known case *Snow v. Eaton Centre*, the creator of the flying geese sculpture sought an injunction as relief from an alleged violation of his moral rights. The artist later prevailed in court on charges of violation of moral rights. *See supra* text accompanying note 130.

<sup>225</sup> This may be the case in countries such as the United States and Australia. *See* NIMMER & GELLER, *supra* note 103, § 7 at AUS-78. In Canada, the copyright act addresses actions for breach of trust or confidence in Section 63.

<sup>226</sup> *See supra* text accompanying notes 168-178 (discussing Copyright Act of the Netherlands).

<sup>227</sup> Dworkin, *supra* note 102, at 265.

common law countries and civil law countries for "a fair and satisfactory balance between authors and owners of copyright."<sup>228</sup>

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<sup>228</sup> *Id.*

### III. MORAL RIGHTS IN UNITED STATES CASE LAW

This chapter addresses United States case law experience with moral rights. The chapter first summarizes significant federal court case law that assessed moral rights prior to enactment of the VARA, and then summarizes judicial decisions rendered since its enactment. Although neither set of cases raises the waiver issue, each is important to show the extent of moral rights protection available domestically.

#### A. PRE-VARA CASE LAW

When the United States adhered to the Berne Convention effective March 1, 1989, Congress determined that additions to U.S. law to protect moral rights were unnecessary because existing federal and state laws were sufficient for full Berne compliance.<sup>229</sup> Although numerous state and federal decisions noted that moral rights were not recognized in United States copyright law,<sup>230</sup> some state legislatures had enacted moral rights laws<sup>231</sup> and a number of judicial decisions accorded some moral rights protection under theories of copyright, unfair competition, defamation, invasion of privacy, and breach of contract.<sup>232</sup> Such cases have continued relevance not only for historical interest, but also for precedential

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<sup>229</sup> See *supra* Ch. I, notes 20 and 33-37 and accompanying text.

<sup>230</sup> *Id.* See 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.21[B][1] n.49. Nimmer suggests that the requirement in the mechanical license provision of 17 U.S.C. § 115(a)(2) that there be no change to "the basic melody or fundamental character of the work" was the sole existing moral rights provision in U.S. copyright law. *Id.* § 8.21[B][1] n.46.

<sup>231</sup> See *supra* Ch. I, notes 40-69 and accompanying text (discussing state moral rights laws).

<sup>232</sup> *Id.* See also *Geisel v. Potter Prods., Inc.*, 295 F. Supp. 331 (S.D.N.Y. 1968) ("[T]he doctrine of moral rights is not part of the law in the United States ... except insofar as parts of that doctrine exist in our law as specific rights--such as copyright, libel, privacy and unfair competition.")

value. Claims made under state law and common law moral rights protection were not entirely preempted under the federal statute enacted in 1990.<sup>233</sup> Arguably, that statute did not preempt actions based upon defamation, invasion of privacy, contracts and unfair competition by "passing off."<sup>234</sup> Further, rights under VARA generally endure only for the artist's life,<sup>235</sup> after which preemption ceases.<sup>236</sup>

The following discussion reviews federal court case law that assessed the moral rights doctrine prior to enactment of VARA, particularly as that doctrine related to the federal copyright law. Landmark state cases such as Crimi v. Rutgers Presbyterian Church<sup>237</sup> are not addressed other than in footnotes,<sup>238</sup> although some of these cases involved state laws

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<sup>233</sup> See supra Ch. I, notes 70-81 and accompanying text (discussing preemption of state laws).

<sup>234</sup> See NIMMER, supra note 230, § 8.21[B][1] n.50 (distinguishing between unfair competition laws relating to "passing off" and misappropriation). Nimmer suggests that there may be no preemption of state attribution or integrity rights that exceed the federal rights. "A score of variants could be posed, the answers to all of which must await development of case law based on the spare statutory language. Construction of this provision should follow general jurisprudence of copyright preemption." Id. § 8.21[B][2].

<sup>235</sup> See 17 U.S.C. § 106A(d)(1). Rights in works created before the effective date of VARA but whose title has not been transferred from the author endure for the same time as the rights conferred by Sec. 106. Id. at (d)(2). In the case of a joint work, VARA rights endure for life of the last surviving artist. Id. at (d)(3).

<sup>236</sup> See NIMMER, supra note 230, § 8.21[B][2].

<sup>237</sup> 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. New York County 1949).

<sup>238</sup> In Crimi, artist Alfred Crimi created a fresco mural painting for Rutgers Presbyterian Church in New York in 1936-38. In 1946, the church painted over it and Crimi sued for either removal of the paint covering his work or removal and restoration of the mural at another location. The court ruled in favor of the church stating, "The time for the artist to have reserved any rights was when he and his attorney participated in the drawing of the contract with the church. No rights in the fresco mural were reserved...." Crimi, 89 N.Y.S.2d at 819. See also Tad Crawford, Legal Guide for the Visual Artist 43 (1989) ("This failure to gain contractual protection meant that Crimi had no power to prevent the destruction of his mural after receiving payment for it.").

as well as other claims; the discussion here focuses on how moral rights fit into the national setting before VARA altered the landscape.<sup>239</sup>

### 1. Vargas v. Esquire

The Vargas case<sup>240</sup> concerned artist Antonio Vargas, who created a series of calendar girl illustrations for Esquire magazine in the 1940s. The case concerned the right of attribution. In June 1940, Vargas and Esquire entered a contract by which Vargas was employed to produce artwork for Esquire and other publications. Vargas made and delivered twelve pictures a year for an Esquire calendar.<sup>241</sup> At first the pictures bore his name or signature; later, by agreement of the parties, the name was changed to Varga and the pictures were called "Varga Girls."<sup>242</sup> In January 1946, Vargas left Esquire with twenty as yet unpublished pictures and in February 1946, sought cancellation of the contract in U.S. District Court.<sup>243</sup> On May 20, 1946, the court found the contract fraudulently obtained and ordered it canceled and set aside as of January 10, 1946.

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<sup>239</sup> For a discussion of preemption of state moral rights law under federal copyright law, see supra Ch. I, notes 67-75 and accompanying text. See also Edward J. Damich, State Moral Rights Statutes: An Analysis and Critique, 13 COLUM.-VLA J.L. & ARTS 291 (1989). See also NIMMER, supra note 74 § 8.21[B](1).

<sup>240</sup> 164 F.2d 522 (7th Cir. 1947).

<sup>241</sup> Id. at 523.

<sup>242</sup> Id. at 523-24.

<sup>243</sup> Id. at 524.

Vargas also complained that Esquire had published his pictures with the words "The Esquire Girl" instead of "The Varga Girl" or instead of Vargas' own signature or name. He charged that the 1947 calendar reproduced twelve of his pictures without his name or any indication that it was his work.<sup>244</sup> Although Esquire had paid for the pictures and Vargas was entitled only to a share of proceeds from the calendar sales under the contract,<sup>245</sup> Vargas alleged that Esquire nevertheless had a duty to refrain from publishing reproductions of his pictures without his signature and credit-line, and that failure to do so constituted a misrepresentation of his work as the work of another.<sup>246</sup>

Affirming the lower court's ruling on this issue in favor of Esquire,<sup>247</sup> the U.S. Court of Appeals for the Seventh Circuit held that the rights of the parties were determined from the contract in effect when Vargas furnished the pictures to the magazine.<sup>248</sup> In his contract, Vargas agreed as an independent contractor to supply the magazine with pictures and granted all rights in the artwork to Esquire.<sup>249</sup>

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<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 527.

<sup>248</sup> *Id.* at 525.

<sup>249</sup> The contract stated:

...The drawings so furnished, and also the name 'Varga', 'Varga Girl,' 'Varga, Esq.,' ...shall forever belong exclusively to Esquire, and Esquire shall have all rights with respect thereto, including...the right to use,  
(continued...)

The court considered three theories: implied contract; moral rights; and misrepresentation or unfair competition, and ultimately ruled in favor of Esquire on each.

a. **Implied contract.** Vargas argued that Esquire violated an implied agreement that it would not publish reproductions of his paintings without credit to him.<sup>251</sup> He cited a number of cases that the court found inapplicable<sup>252</sup> because in each of them an author signed a contract or license conferring limited rights and reserving for the author the balance of the rights. The Esquire court contrasted those cases to Vargas', because he "by plain and unambiguous language completely divested himself of every vestige of title and ownership of the pictures, as well as the right to their possession, control and use."<sup>253</sup>

b. **Moral rights.** Vargas advanced a theory of moral rights, but the court noted that such rights simply were not recognized in the United States, and stated its unwillingness to "make any new law in this respect."<sup>253</sup>

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<sup>249</sup>(...continued)

lease, sell or otherwise dispose of the same as it shall see fit, and all radio, motion picture and reprint rights. Esquire shall also have the right to copyright any of said drawings, names, designs or material... Id. at 525.

<sup>250</sup> Id.

<sup>251</sup> Uproar Co. v. National Broadcasting Co., 81 F.2d 373 (1st Cir. 1936); Kirke La Belle Co. v. Armstrong Co., 188 N.E. 163 (1933); Manners v. Morosco, 252 U.S. 317 (1920).

<sup>252</sup> 164 F. 2d at 525. Instead, the court cited the rule of Domeyer v. O'Connell, 4 N.E.2d 830 (1936), that, because the object of construction is to ascertain the parties' intent, an implied intention is one necessarily arising from the language used or situation created by such language. The court found no such implied reservation of rights in the grantor here. Id. at 526.

<sup>253</sup> Id. at 526.

c. **Misrepresentation or unfair competition**. This claim would rest on the premise that Esquire took and used to its own advantage something in which Vargas had a property right. The court found such a premise difficult to accept in light of the rights Vargas conferred upon Esquire by contract.<sup>254</sup>

2. **Granz v. Harris**

**Granz v. Harris**<sup>255</sup> was an action seeking rescission of a contract for sale of master phonographic recordings and damages for breach of contract.<sup>256</sup> The case concerned an attribution right, and to some extent an integrity right based on contract and tort law.

Concert promoter Norman Granz recorded a jazz concert at the New York Philharmonic on 16-inch master disc and re-recorded part of the concert on six 12-inch master discs. With three discs for each song, the six master discs included two songs revolved at 78 revolutions per minute (rpm) and were suitable for manufacturing commercial phonographs of the same size and playable at the same speed. Granz sold these master discs under a contract dated August 15, 1945.<sup>257</sup>

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<sup>254</sup> *Id.* at 526-27. For a biography of and interview with artist Alberto Vargas concerning his experience in the *Esquire* litigation, TAD CRAWFORD, *LEGAL GUIDE FOR THE VISUAL ARTIST* 47-51 (1989).

<sup>255</sup> 198 F.2d 585 (2d Cir. 1952).

<sup>256</sup> *Id.* at 586. The suit also sought an accounting and attorneys fees. *Id.* Federal jurisdiction rested on diversity of citizenship.

<sup>257</sup> *Id.*



The contract required that records manufactured and sold from the purchased masters include the credit-line "Presented by Norman Granz" and liner notes prepared by Granz. The defendant Harris re-recorded the music from the masters on ten-inch 78 rpm masters, from which he further manufactured and sold phonograph records of the same size and speed.<sup>258</sup> Harris later re-recorded the contents of the purchased masters on a ten-inch 33 rpm master, and manufactured records of the same size and speed for retail sale.<sup>259</sup> The issue before the appellate court was whether Harris violated Granz' rights by manufacturing and selling 10-inch 33 rpm records and 10-inch 78 rpm records.<sup>260</sup> The number of revolutions-per-minute was significant because "a ten-inch record revolving at 78 revolutions a minute has a shorter playing time and a smaller content than a twelve-inch record revolving at the same speed."<sup>261</sup> Although the district court believed there was no deletion of music, the Second Circuit considered the testimony of a musical expert that there was,<sup>262</sup> and

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<sup>258</sup> *Id.* Also the album cover at first did not contain the credit-line or notes, but was later corrected. *Id.* at 586-87.

<sup>259</sup> *Id.* at 587.

<sup>260</sup> *Id.* The case also considered whether selling records singly instead of as part of an album violated Granz' rights. *Id.*

<sup>261</sup> *Id.* at 587.

<sup>262</sup> *Id.*

relied on its own observation "listening to the records." The appeals court found that a full eight minutes of music was omitted.<sup>263</sup>

The court fashioned a kind of attribution right under the facts of the case. Selling abbreviated records with the credit line "Presented by Norman Granz" would constitute unfair competition, even disregarding the terms of the contract.<sup>264</sup> Here, the terms of the contract provided even greater protection:

...the contract required the defendant to use the legend "Presented by Norman Grantz," that is, to attribute to him the musical content of the records offered for sale. This contractual duty carries by implication, without the necessity of an express prohibition, the duty not to sell records which make the required legend a false representation. In our opinion, therefore, sale of the ten-inch abbreviated records was a breach of the contract.<sup>265</sup>

The concurring judge agreed that "whether by way of contract or tort" the plaintiff was entitled to prevent publication "as his, of a garbled version of his uncopyrighted product."<sup>266</sup>

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<sup>263</sup> *Id.* The court ruled the trial judge's finding erroneous. *Id.* at 588.

<sup>264</sup> *Id.* at 588. Otherwise, the purchaser of master discs could lawfully use them to produce and sell abbreviated records. *Id.*

<sup>265</sup> *Id.* Because damages were difficult to prove, and harm to the plaintiff's reputation as a jazz concert presenter could be irreparable, the court said Grantz was entitled to an injunction unless he waived his right to attribution. *Id.* The court remanded the question whether, in approving the album cover change, the plaintiff had waived such right. *Id.* at 588-89.

<sup>266</sup> *Id.* at 589 (Frank J., concurring).

An artist sells one of his works to the defendant who substantially changes it and then represents the altered matter to the public as that artist's product. Whether the work is copyrighted or not, the established rule is that, even if the contract with the artist expressly authorizes reasonable modifications (e.g., where a novel or stage play is sold for adaptation as a movie), it is an actionable wrong to hold out the artist as author of a version which substantially departs from the original.<sup>267</sup>

The concurrence described such misattribution as a kind of "unfair competition" or "passing off,"<sup>268</sup> but carefully distinguished a grant of injunctive relief based on an interpretation of a contract<sup>269</sup> from an embrace of the doctrine of "moral right".<sup>270</sup> stating:

Plaintiff, in asking for such relief, relied in part not on the contract but on the doctrine of artists' "moral right," a compendious label of a "bundle of rights" enforced in many "civil law" countries. Able legal thinkers, pointing out that American courts have already recognized a considerable number of the rights in that "bundle," have urged that our courts use the "moral right" symbol... The "moral right" doctrine, as applied in some countries, includes very extensive rights which courts in some American jurisdictions are not yet prepared to acknowledge; as a result, the phrase "moral right" seems to

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<sup>267</sup> Id. (citing Packard v. Fox Film Corp., 202 N.Y.S. 164 (1923); Curwood v. Affiliated Distributors, Inc., 283 F. 219, 222 (1922); Drummond v. Altemus, 60 F. 338 (1894); Annot., Unfair Competition-Art Literature, 19 A.L.R. 949 (1922)).

<sup>268</sup> Id.

<sup>269</sup> Id. at 590.

<sup>270</sup> Id. at 591.

have frightened some of those courts to such an extent that they have unduly narrowed artists' rights.<sup>271</sup>

### 3. Gilliam v. American Broadcasting Cos.

Gilliam<sup>272</sup> was the first U.S. case to establish an author's right of integrity to prevent distortion or destruction of a work. Gilliam involved the group of British writers and performers known as "Monty Python," who created the television programs, "Monty Python's Flying Circus," for the British Broadcasting Corporation (BBC).

a. The contract and the lawsuit. The Monty Python - BBC scriptwriters' agreement detailed procedures to be followed if alterations were made to a script prior to recording a program, but did not entitle BBC to alter a program once recorded.<sup>273</sup> BBC could license transmission of the program overseas,<sup>274</sup> and in July 1975, American Broadcasting Company (ABC) agreed to broadcast two ninety-minute specials consisting of three thirty-minute Monty Python programs each.<sup>275</sup> When ABC broadcast the first of the specials on October 3, 1975, it omitted 24 of the original 90

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<sup>271</sup> Id. at 590 n. 17 (citing Vargas v. Esquire, 164 F.2d 522, 526 (7th Cir. 1947)). The concurrence did not favor devising and employing "such a common name" as moral rights, which it saw as a generalization potentially breeding new problems. Id.

<sup>272</sup> 538 F.2d 14 (2d Cir. 1976).

<sup>273</sup> Id. at 17.

<sup>274</sup> Id.

<sup>275</sup> Id. at 18.

minutes of recording.<sup>276</sup> The Monty Python plaintiffs were "appalled" at the discontinuity and "mutilation", and when negotiations over editing failed before broadcast of the second special, the group sued for an injunction and damages.<sup>277</sup>

The district court denied a preliminary injunction because it was unclear who owned copyright in programs produced by BBC from Monty Python scripts, and on other grounds.<sup>278</sup> On appeal, the court considered three factors: harm to Monty Python if the injunction were denied; harm to ABC if the injunction were granted; and likelihood that the plaintiffs would succeed on the merits.<sup>279</sup> The appellate court found that all three factors weighed in favor of Monty Python, and granted the preliminary injunction.<sup>280</sup> Injury to Monty Python from broadcast of the edited versions was irreparable. This was Monty Python's first broadcast to a national network audience and any misrepresentation of their work could diminish the possibility of securing a loyal following or larger audience. "Such an injury to professional reputation cannot be measured in monetary terms or recompensed

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<sup>276</sup> According to ABC, some of the editing was done to make time for commercials and some was done to omit offensive or obscene matter. *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* The district court denied the preliminary injunction on three additional grounds: first, the court found it unclear whether Time-Life and BBC were indispensable parties to the litigation; second, the court found that ABC would suffer significant financial loss if it were enjoined a week before a scheduled broadcast; and, third, the court found that Monty Python had been too casual in pursuing the matter. *Id.* at 18.

<sup>279</sup> *Id.* at 18-19. The district court considered the same factors, but reached a different conclusion. *Id.*

<sup>280</sup> *Id.* at 19.

by other relief," the court said.<sup>281</sup> In contrast, there was no danger that ABC's relations with affiliates or the public would suffer irreparably if Monty Python broadcasts were enjoined, because no rebroadcast of the edited specials had been rescheduled and no advertising costs had been incurred.<sup>282</sup>

Finally, there was a likelihood that Monty Python would succeed on the merits, because "the editing was substantial." Approximately 27 percent of the original program was omitted, and the editing "contravened contractual provisions that limited the right to edit Monty Python material."<sup>283</sup>

b. **Derivative Work Copyright, and Moral Rights.** The appellate court agreed with Monty Python that, because the recorded program was a derivative work taken from a script in which they held copyright, use of the program was limited by the license granted to BBC by Monty Python.<sup>284</sup>

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<sup>281</sup> Id.

<sup>282</sup> Id.

<sup>283</sup> Id. at 19.

<sup>284</sup> Id. Section 7 of the 1909 Copyright Act, under which this case was decided, provides that:  
[A]daptations, arrangements, dramatizations... or other versions  
of...copyrighted works when produced with the consent of the proprietor of  
the copyright in such works...shall be regarded as new works subject to  
copyright..."

17 U.S.C. § 7 (1909). As a dramatization of the script, the recorded program fell into this category. 538 F.2d at 19.

Because copyright in an underlying script survives intact despite incorporation of that work into a derivative work, one who uses a script even with permission of the proprietor of the derivative work may infringe the underlying copyright.<sup>285</sup> If the proprietor of a derivative work is licensed by the proprietor of copyright in the underlying work to vend or distribute the derivative work to third parties, then those third parties will not be liable for use of the underlying work in a manner consistent with the license; but one who obtains permission to use a copyrighted script in the production of a derivative work may not exceed the specific purpose for which permission was granted.<sup>286</sup>

Here, Monty Python claimed that revisions in the script and thus in the recorded program could be made only after consultation with Monty Python, and that ABC's broadcast of a program edited without consultation exceeded the scope of any license that BBC was entitled to grant.<sup>287</sup> The Gillian court recognized that "licensees are entitled to some small degree of latitude in arranging the licensed work for presentation to the public in a manner

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<sup>285</sup> Id. at 20 (citing Davis v. E.I. DuPont deNemours & Co., 240 F. Supp. 612 (S.D.N.Y. 1965) (defendants infringed when they obtained permission to use screenplay in preparing television script without obtaining permission of author of play upon which screenplay was based)).

<sup>286</sup> Id. at 20-21 (citing Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150 (2d Cir.), cert. denied, 393 U.S. 826 (1968); G. Ricordi & Co. v. Paramount Pictures Inc., 189 F.2d 469 (2d Cir.), cert. denied, 342 U.S. 849 (1951)).

<sup>287</sup> Id.

consistent with the licensee's style or standards."<sup>288</sup> That privilege does not extend to the degree of editing that occurred here, particularly given the contractual provisions limiting the right to edit.<sup>289</sup>

c. Unfair competition or misrepresentation and the moral rights

question. The court then addressed the moral rights question. It was likely, the court said, that under some theory akin to moral rights, ABC's cuts constituted "an actionable mutilation of Monty Python's work."<sup>290</sup>

American copyright law, as presently written, does not recognize moral rights. . . . Nevertheless, the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law . . . cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent. Thus courts have long granted relief for misrepresentation of an artist's

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<sup>288</sup> *Id.* at 23 (citing Strachborneo v. Arc. Music Corp., 357 F. Supp. 1393, 1405 (S.D.N.Y. 1973); Preminger v. Columbia Pictures Corp., 267 N.Y.S.2d 594, aff'd 269 N.Y.S.2d 913, aff'd 219 N.E.2d 431 (1966)).

<sup>289</sup> The court found ABC's decision to edit words like "hell" and "damn" was "inexplicable given today's standard television fare." *Id.* at 23. Further, editing obscene matter did not free ABC from an infringement claim:

If, however, ABC honestly determined that the programs were obscene in substantial part, it could have decided not to broadcast the specials at all, or it could have attempted to reconcile its differences with appellants. The network could not, however, free from a claim of infringement, broadcast in a substantially altered form a program incorporating the script over which the group had retained control.

*Id.*

<sup>290</sup> *Id.* at 23-24.



work by relying on theories outside the statutory law of copyright, such as contract law. Granz v. Harris, 198 F.2d 585 (2d Cir. 1952) (substantial cutting of original work constitutes misrepresentation), or the tort of unfair competition. Prouty v. National Broadcasting Co., 26 F. Supp. 265 (D. Mass. 1939). Although such decisions are clothed in terms of proprietary right in one's creation, they also properly vindicate the author's personal right to prevent the presentation of his work to the public in a distorted form.<sup>291</sup>

Here, Monty Python claimed that ABC's editing mutilated the original work, and that broadcast of the edited programs under the name Monty Python violated the Lanham Act.<sup>292</sup> This statute which is invoked to prevent misrepresentations that may injure business or personal reputation "even where no registered trademark is concerned," is the "federal counterpart to state unfair competition laws." To violate this provision of the Lanham Act, it is sufficient that a representation of a product creates a false impression of the product's origin.<sup>293</sup>

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<sup>291</sup> Id. at 24.

<sup>292</sup> The Lanham Act, § 43(a), 15 U.S.C. § 1125(a), provides in relevant part:  
Any person who shall affix, apply, or annex, or use in connection with any goods or services... a false designation of origin, or any false description or representation... and shall cause such goods or services to enter into commerce... shall be liable to a civil action by any person... who believes that he is or is likely to be damaged by the use of any such false description or representation.

<sup>293</sup> Id. (citing Rich v. RCA Corp., 390 F. Supp. 530 (S.D.N.Y. 1975); Geisel v. Poynter Products, Inc., 283 F. Supp. 261, 267 (S.D.N.Y. 1968)).

Similarly, where a television network broadcasts a program designated as having been written and performed by a group but which has been edited without the writer's consent into a form departing substantially from the original work, the writer or performer suffers because the public has only the final product by which to judge the work. An allegation that a defendant has presented a distorted version of a writer or performer's work seeks to redress the very rights protected by the Lanham Act and should be recognized as stating a cause of action under that statute.<sup>294</sup>

The concurring judge believed the court should restrict its opinion to contract and copyright issues, and that there was no need to discuss the Lanham Act or unfair competition.<sup>295</sup> The concurrence particularly cautioned against use of the Lanham Act as a substitute for moral rights, which it said were not recognized under United States copyright law. In the view of the concurring judge, a distortion in connection with a use may constitute an infringement of copyright. As a matter of contract, an obligation to mention the name of the author carries the implied duty not to make changes in the work that would

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<sup>294</sup> *Id.* at 24-25. The court believed such a cause of action existed in *Gilliam*. The edited version "at times omitted the climax of the skits to which appellants' rare brand of humor was leading and at other times deleted essential elements in the schematic development of a story line." *Id.* at 25. The court therefore issued a preliminary injunction to prevent repetition of the broadcast prior to final resolution of the case. *Id.*

<sup>295</sup> The concurrence also suggested that since the Lanham Act concerns false description of origin of goods, a legend disclaiming Monty Python's approval of the edited version would preclude violation of the Act. The majority opinion disagreed; a few words would not erase the indelible impression of a television broadcast nor reach "viewers who tuned into the broadcast a few minutes after it began." *Id.* at 25 n.13.

render the credit line a false attribution of authorship, and if a licensee has no right by contract to distort a work, there will be a breach of contract.

#### **4. Wojnarowicz v. American Family Association**

The Wojnarowicz case<sup>296</sup> is important because the state moral rights law withstood numerous challenges. Plaintiff David Wojnarowicz was an artist of multimedia works including paintings, collages, photographs, sculptures, videos, and performances, who sometimes used sexually explicit images to bring attention to the AIDS epidemic.<sup>297</sup> Defendant American Family Association (AFA),<sup>298</sup> dedicated to "promoting decency in the American society,"<sup>299</sup> protested National Endowment for the Arts funding by distributing a pamphlet, in which it reproduced 14 fragments of Wojnarowicz's work.<sup>300</sup> Wojnarowicz sued AFA for copyright infringement, defamation, and violations of the New York Artists' Authorship Rights Act and the Lanham Act.<sup>301</sup> The U.S. District Court for the Southern

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<sup>296</sup> 745 F. Supp. 130 (S.D.N.Y. 1990).

<sup>297</sup> 745 F. Supp. at 133.

<sup>298</sup> AFA executive director Donald E. Wildmon was also named as defendant.

<sup>299</sup> 745 F. Supp. at 133.

<sup>300</sup> *Id.* at 134.

<sup>301</sup> *Id.* at 132-33.

District of New York found for Wojnarowicz under the New York Artists' Authorship Rights Act, but dismissed his other claims.<sup>302</sup>

The New York law provides in relevant part that:

[N]o person other than the artist or a person acting with the artist's consent shall knowingly display in a place accessible to the public or publish a work of fine art or limited edition multiple of not more than three hundred copies by that artist or a reproduction thereof in an altered, defaced, mutilated or modified form if the work is displayed, published or reproduced as being the work of the artist, or under circumstances which would reasonable [sic] be regarded as being the work of the artist, and damage to the artist's reputation is reasonably likely to result unerefrom.<sup>303</sup>

a. **Federal Preemption Prior to VARA.** The defendants argued that the state moral rights claim was preempted by federal copyright law. The court disagreed.<sup>304</sup> If the state law provides different rights from those available under federal law, it is not preempted, the court said.<sup>305</sup> Where the state law violation is predicated on an act incorporating elements beyond mere copying, the action is qualitatively different and there is no preemption.<sup>306</sup>

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<sup>302</sup> Id. at 133.

<sup>303</sup> Id. at 134-35 (citing N.Y. Cultural Affairs Law Section 14-03 (McKinney's Supp. 1990)).

<sup>304</sup> Id. at 135.

<sup>305</sup> Id. (citing the "extra element" test in Mayer v. Josiah Wedgwood & Sons, Ltd., 601 F. Supp. 1523, 1535 (S.D.N.Y. 1985)).

<sup>306</sup> Id. (citing Harper & Row Publishers, Inc. v. Nation Enterprises, 723 F.2d 195, 200 (2d Cir. 1983), rev'd on other grounds, 471 U.S. 539 (1985)). In contrast, the court cited two other cases involving preemption (continued...)

In 1990, this court found that section 14.03 of the New York Artists' Authorship Rights Act was qualitatively different from then-existing federal copyright law: "The state Act endeavors to protect an artist's reputation from the attribution to him of altered, defaced, mutilated or modified works of art."<sup>307</sup> Importantly, the court made note of the pending federal moral rights legislation.<sup>308</sup>

The court also rejected a preemption argument under the Constitution's supremacy clause. The defendants argued that a supremacy clause conflict existed because, if the artist transfers copyright in a work, the new copyright owner has the rights under sec. 106 to prepare derivative works, or to alter and display the work, but the New York statute would restrain that right if the altered version were deemed harmful to the artist's reputation. The court said the New York law did not conflict with the pre-VARA Copyright Act and was not preempted under the supremacy clause.<sup>309</sup>

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<sup>306</sup>(...continued)

of a section of the N.Y. Arts & Cultural Affairs Law concerning the right of reproduction, "a property right expressly granted in, and thus preempted by the Copyright Act." These were: Tracy v. Skate Key, Inc., 697 F. Supp. 748 (S.D.N.Y. 1988); and Ronald Litoff, Ltd. v. American Express Co. 621 F. Supp. 981 (S.D.N.Y. 1985).

<sup>307</sup> 745 F. Supp. at 135 (citing Edward J. Damich, The New York Artists' Authorship Rights Act: A Comparative Critique, 84 COLUM. L. REV. 1734, 1738-39 (1984)).

<sup>308</sup> The court noted that the U.S. House of Representatives had passed H.R. 2690, and that the Senate Subcommittee on Patents, Copyrights and Trademarks amended and approved a similar bill, S. 1198, on June 28, 1990, although several differences had yet to be resolved. Id. at 136 n.2.

<sup>309</sup> Id. at 136. "The Court does not agree that the Copyright Act authorizes a copyright owner other than the creator to publish or display an altered work, attributing that altered work to the original creator, and defendants have cited no decisions to that effect." Id. (emphasis in original).

b. **Unfaithful Reproductions.** AFA argued that distribution of a photocopy of cropped images from Wojnarowicz's work did not violate the state moral rights law because it did not alter or modify his original work, but the court said the statute protected against alterations of reproductions as well as originals.<sup>310</sup> Section 14.03(1) of the New York law states that no person may knowingly display or publish a work of fine art "or a reproduction thereof" in altered form if the work is "displayed, published or reproduced as being the work of the artist."<sup>311</sup> Section 14.03(3)(b) states that, in the case of a reproduction, a change that is an ordinary result of the medium of reproduction does not by itself create a violation or a right to disclaim authorship. Read together, these two subsections indicate that deliberate alterations (such as selective cropping) will constitute violations, while alterations that result from ordinary reproduction processes (such as reduction in overall size or loss of detail), will not.<sup>312</sup> Unfaithful reproductions violate the New York statute if publicly displayed so as to damage the reputation of the author of the original.<sup>313</sup>

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<sup>310</sup> *Id.* at 136.

<sup>311</sup> *Id.* at 136-37. Compare 17 U.S.C. § 106A(c)(3) (stating that moral rights do not apply to certain reproductions).

<sup>312</sup> 745 F. Supp. at 137 (citing *Damich*, supra note 307, at 1740 (1984)).

<sup>313</sup> *Id.* at 137.

The court rejected AFA's claim that the limit in section 14.03(3)(e) of the statute to "works of fine art...of not more than 300 copies" precluded its application in this case. The language does not refer to the defendants' altered material, nor to the plaintiff's catalogue; the limitation pertains to the underlying works protected by the statute.<sup>314</sup> The court rejected AFA's argument that the Act did not apply because they copied works from the plaintiff's catalogue, not his original artwork. The fact that AFA photographed an authorized photograph instead of the original work did not exempt them from the statute because, otherwise, once an artist published his work, anyone wanting to alter the work could simply copy from the catalogue rather than the original work.<sup>315</sup>

c. **Damage to reputation.** The New York law was meant to protect an author's reputation and right of attribution as well as the right of integrity.<sup>316</sup> The mass mailing of an altered photographic reproduction is likely to reach a far greater audience and cause greater harm to an artist than the display of an altered original, which may reach only a limited audience.<sup>317</sup>

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<sup>314</sup> *Id.* at 139 n.7. VARA contains a similar limitation to limited edition works of no more than 200 copies. 17 U.S.C. § 101 (definition of "work of visual art").

<sup>315</sup> 745 F. Supp. at 138 n.5.

<sup>316</sup> *Id.* at 137.

<sup>317</sup> *Id.* at 137-38.

Although AFA claimed that Wojnarowicz failed to demonstrate that the alteration caused damage to his reputation, the trial testimony of Philip Yenawine, an expert on contemporary art employed by the Modern Museum of Art in New York, established a reasonable likelihood that AFA's actions jeopardized the monetary value of Wojnarowicz's work and impaired his professional and personal reputation due to perceived association with pornography.<sup>318</sup> Even Robert Mapplethorpe and Andre Serrano were not so vulnerable as Wojnarowicz, because their works were presented in entirety rather than cropped, and because their reputations were already established when controversies arose.<sup>319</sup>

d. **Lanham Act**. Section 43(a) of the Lanham Act traditionally has covered misrepresentations of a product.<sup>320</sup> Because the pamphlet here was not employed

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<sup>318</sup> *Id.* at 139.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.* at 141 (citing Lanham Act § 43(a), amended Nov. 16, 1988, Pub. L. No. 100-667, Title 1, sec.132, 102 Stat. 3946, effective Nov. 16, 1989).

As amended, § 43(a), 15 U.S.C. § 1125(a) (West Supp. 1990) provides, in relevant part:

Any person who, on or in connection with any goods or service, uses in commerce...any false designation of origin, false or misleading description of fact, or false or misleading representation of fact which --

(1) is likely to cause confusion, or to cause mistake, or to deceive as to the ...origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.



in "advertising or promotion" of goods or services, the plaintiff failed to satisfy a prerequisite to invoking the Lanham Act.<sup>321</sup>

e. **Copyright infringement and fair use.** Wojnarowicz was owner of copyright in the artworks at issue, each of which was registered with the U.S. Copyright Office on May 11, 1990. By directly copying portions of the artworks, AFA violated his exclusive right to reproduce the work, and by editing or cropping, AFA violated his exclusive right to prepare derivative works.<sup>322</sup>

AFA defended on grounds that their actions constituted criticism and comment and thus fair use under §17 U.S.C. 107. The court agreed; AFA's use of the copyrighted works was protected.<sup>323</sup> Applying the four fair use factors, AFA's primary purpose was to oppose federal funding of "pornography," not to raise funds. Although the works were highly protected creative expression, only small images were used from the plaintiff's works.<sup>324</sup> As for market effect, excerpting a work for criticism and comment does not produce a work in competition with the copyrighted work and a copyright violation does not

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<sup>321</sup> 745 F. Supp. at 141-42.

<sup>322</sup> *Id.* at 142 (citing 17 U.S.C. § 106(1)&(2)).

<sup>323</sup> *Id.* at 143.

<sup>324</sup> *Id.* at 144.

occur where a ruinous review decreases demand for the work. Plaintiff's argument that AFA misrepresented his work was inapposite to an infringement claim.<sup>325</sup>

f. **Free Speech**. The court rejected the argument that alteration, mutilation or modification of artwork is protected speech under the First Amendment. The pamphlet contained protected speech, but the "public display of an altered artwork, falsely attributed to the original artist...is not the type of speech" that demands protection. The court rejected constitutional arguments based on vagueness and overbreadth. The statute was not impermissibly vague merely because it requires a determination as to whether damage to an artist's reputation is reasonably likely to result from an alteration and attribution.<sup>326</sup>

g. **Defamation**. Wojnarowicz also claimed that by removing all artistic and political content of his works, reducing them to banal sexual images, and attributing them to him, AFA defamed his work and reputation.<sup>327</sup> The court dismissed this claim. AFA's director did not have the sufficiently reckless state of mind to satisfy the actual malice requirement for defaming a public figure.<sup>328</sup>

h. **Remedies**. AFA's pamphlet "irreparably harmed plaintiff's professional and personal reputation" and warranted injunctive relief under the New York

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<sup>325</sup> *Id.* at 145-46.

<sup>326</sup> *Id.* at 140.

<sup>327</sup> *Id.* at 147.

<sup>328</sup> *Id.* at 148. The artist in this case was a limited purpose public figure. *Id.* at 147.

statute, so the court enjoined AFA from further publication of the pamphlet. Other pamphlets criticizing NEA funding would be permitted if such materials "do not suggest to reasonable readers that a fragment of one of plaintiff's art works constitutes the complete work."<sup>329</sup> The New York law provides a right of "disattribution,"<sup>330</sup> so the court ordered AFA to publish a corrective advertisement in a major daily newspaper. Wojnarowicz proved AFA's actions were likely to damage his reputation, but had shown no actual damages, so the court also awarded nominal damages of \$1.00.<sup>331</sup>

## **B. CASE LAW UNDER THE VISUAL ARTISTS RIGHTS ACT**

A few decisions have been rendered since enactment of VARA, although none has yet focused on the issue of waiver.

### **1. Carter v. Helmsley-Spear, Inc.**

A decision recently reversed in part by the U.S. Court of Appeals for the Second Circuit, Carter v. Helmsley-Spear, Inc.<sup>332</sup> was the first case to address thoroughly the new federal moral rights legislation.<sup>333</sup> Because the trial court awarded relief under VARA, its

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<sup>329</sup> Id. at 149.

<sup>330</sup> Id. (citing N.Y. ARTS & CULT. AFF. LAW § 14.03(2)(a) (McKinney's Supp. 1990)).

<sup>331</sup> Id.

<sup>332</sup> 861 F. Supp. 303 (S.D.N.Y. 1994), rev'd and vacated in part and aff'd in part, 71 F.3d 77 (2d. Cir. 1995).

<sup>333</sup> See id. at 330 ("This Court is the first district court in the country to interpret and apply the sections of VARA at issue here.").

decision warrants a thorough review. The case involved three sculptors, John Carter, John Swing, and John Veronis, Jr., known collectively as "the Three Js." These sculptors were commissioned to install artwork in the lobby of a Queens, New York warehouse owned and managed by Helmsley-Spear, Inc.<sup>334</sup>

a. **The contract and the artwork.** The Queens building was leased to a Limited Partnership and managed by Sig Management Company ("Sig"), at the time of the commission (from February 1, 1990 to June 1993).<sup>335</sup> On December 16, 1991, Sig commissioned the Three Js "to design, create and install sculpture and other permanent installations" in the building lobby. The contract granted the artists "full authority in design, color and style," while Sig retained authority to direct the location of installations.<sup>336</sup> The Three Js would retain copyright in the sculptural installations and receive design credit, while Sig would receive 50 percent of any proceeds earned from exploiting the copyright.<sup>337</sup> Under the contract, each sculptor was paid \$1000 a week to create art work in the building lobby continuously from December 1991 until April 6, 1994.<sup>338</sup>

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<sup>334</sup> The property was owned by a partnership comprised of Mr. Alvin Schwartz (an employee of Helmsley-Spear, Inc.) and Supervisory Management Corp. (owned by Helmsley Enterprises, Inc.). *Id.* at 312.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *Id.* at 313.

The resulting work included sculptural art attached to the ceiling, walls, and lobby floor, a tile mosaic covering much of the floor and walls, and the interior of three elevators opening onto the Lobby; yet the various elements appeared to form an integrated whole.<sup>339</sup> The work was thematically consistent, with a recycling motif. Recycled materials were used, the mosaic was made of tiles from recycled glass, and the sculptural elements were built from discarded objects. A statement in the floor mosaic, "DO YOU REMEMBER WATER," flowed from a depiction of a giant mouth surrounding an elevator, portraying the effect of failure to recycle. Sculptural elements hung from the ceiling represented "space junk," to show the danger of dumping refuse into space.<sup>340</sup> Some elements were less thematically integrated in the work; they included a chandelier, florescent snake, illuminated floor plaque, and the headlights of a bus.<sup>341</sup>

b. **The order to leave and the lawsuit.** The limited partnership's lease terminated on March 31, 1994, and a week later, on April 7, Helmsley-Spear ordered the artists to leave the property. Helmsley-Spear made statements implying that they intended to alter or remove the work; their counsel later acknowledged, "we don't want the sculptures

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<sup>339</sup> *Id.* at 314. See also *id.* at 315 ("[T]he various sculptural elements appear to be interrelated -- rather than distinct works of art that could be separated from the remainder of the Work without losing their meaning.").

<sup>340</sup> *Id.* at 315.

<sup>341</sup> *Id.*

there at all.... We don't want them there."<sup>342</sup> It was uniformly agreed that removal of the work would cause its destruction.<sup>343</sup>

The sculptors sued, claiming infringement of their VARA rights and copyright, as well as tortious interference with contract. They obtained a temporary preliminary injunction<sup>344</sup> and sought a permanent injunction, damages, attorneys fees and costs. The defendants filed a counterclaim for waste.<sup>345</sup>

c. **Claim under VARA.** The VARA claim involved three primary issues:

1) whether plaintiffs' work was a single artwork or several pieces; 2) whether it was a work of applied art; and 3) whether it was a "work-made-for-hire."

(i) **Single work of art.** With the exception of certain items,<sup>346</sup>

the court concluded that the artwork was a single work of interrelated elements, rather than several discreet works to be treated separately under VARA.<sup>347</sup> The court gave several

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<sup>342</sup> *Id.* at 325 n.11.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.* at 311.

<sup>345</sup> *Id.*

<sup>346</sup> Certain elements were not integrated into the work, including the building directory, entrance steps, and parts of the ceiling and wall lighting. *Id.* at 315.

<sup>347</sup> *Id.* at 314.

reasons for this conclusion. First, the authors considered it to be a single work of art.<sup>348</sup> Second, expert witnesses testified that the work's elements were interrelated. Third, before installing an element, the artists determined whether it would "work well" with the other elements.<sup>349</sup> Fourth, the various elements simply appeared to form an integrated whole in the court's view.<sup>350</sup> Fifth, the work was thematically consistent in its recycling motif.<sup>351</sup>

(ii) **Applied art.** A second issue arose because the defendants asserted that the work incorporated elements of "applied art."<sup>352</sup> Works of applied art are excluded from the VARA definition of protected "works of visual art."<sup>353</sup> Even examining the work's sculptural elements individually, most could not reasonably be described as applied art and would serve no utilitarian purpose.<sup>354</sup> Nothing in VARA proscribes

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<sup>348</sup> Id. Plaintiff John Carter testified that all the pieces were "interrelated and to remove one contaminates the meaning of the whole piece. It would be like removing part of a painting...." The other two sculptors testified similarly. Id.

<sup>349</sup> Id.

<sup>350</sup> The court inspected the art at the parties' request and found it to be single work. Id. at 315.

<sup>351</sup> Id.

<sup>352</sup> "Applied art" is two- or three-dimensional ornamentation or decoration affixed to otherwise utilitarian objects. Id. (citing Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 997 (2d Cir. 1980)).

<sup>353</sup> See 17 U.S.C. § 101 ("A work of visual art does not include...applied art").

<sup>354</sup> 861 F. Supp. at 315. Certain elements not integrated into the work, including the building directory, entrance steps, and parts of the ceiling and wall lighting, clearly were applied art or strictly utilitarian objects, and hence were excluded from protection under VARA. Id. at 316.

protection of works that incorporate elements of applied art.<sup>355</sup> The legislative history confirms that "new and independent work created from snippets of these materials, such as a collage, is of course not excluded."<sup>356</sup>

(iii) **Work made for hire.** The third issue raised by the VARA claim was whether the artwork was a work made for hire.<sup>357</sup> Works made for hire are excluded from the definition of VARA protected works of visual art.<sup>358</sup> The lower court found that the plaintiffs were not employees and the work was not a "work made for hire" as defined in the Copyright Act.<sup>359</sup> The work-for-hire issue in Carter is interesting because of the court's discussion of the artists' retention of copyright as a factor in the VARA work-for-hire determination.<sup>360</sup>

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<sup>355</sup> Id. at 315.

<sup>356</sup> H.R. Rep. No. 514, 101st Cong., 2d Sess. 13-14 (1990), cited in Carter v. Helmsley-Spear, Inc., 861 F. Supp. at 316.

<sup>357</sup> A "work made for hire" is defined in relevant part as:

- 1) a work prepared by an employee within the scope of his or her employment; or
- 2) a work specially ordered or commissioned for use as a contribution to a collective work..., if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

17 U.S.C. § 101.

<sup>358</sup> See 17 U.S.C. § 101 ("A work of visual art does not include... any work made for hire").

<sup>359</sup> 861 F. Supp. at 322.

<sup>360</sup> See supra notes 340-42 and accompanying text (discussing retention of copyright).



Because the second part of the work-for-hire definition was indisputably inapplicable in this case,<sup>361</sup> the court considered whether the Three Js were employees of the commissioning entities and, if they were, whether they were acting within the scope of their employment under the general common law of agency.<sup>362</sup> The court looked to the determinative factors enumerated in Community for Creative Non-Violence v. Reid<sup>363</sup> and Aymes v. Bonelli.<sup>364</sup>

The Carter court began with the five Reid factors called most "significant" by the Aymes court.<sup>365</sup>

- **Right to control.** Sig and the building management did not have the right to control the manner and means by which the work was created. Under their contract, the Three Js had "full authority in design, color and style."<sup>366</sup> Building management representatives had no input on the art work's design.<sup>367</sup> The sculptors had complete artistic freedom over the work.<sup>368</sup> The fact that they "occasionally adopted" suggestions to alter the work "for

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<sup>361</sup> 861 F. Supp. at 316.

<sup>362</sup> Id.

<sup>363</sup> 490 U.S. 730 (1989).

<sup>364</sup> 980 F.2d 857 (2d Cir. 1992).

<sup>365</sup> Carter, 861 F. Supp. at 317 (citing Aymes, 980 F.2d at 861).

<sup>366</sup> Id. at 317.

<sup>367</sup> Id. One management representative said his suggestions for the work were largely ignored. The court dismissed this testimony as not credible in part because the witness took no "action to force compliance with his suggestions," and because the witness "is aware that he may be sued by defendants for the actions that he took in relation to the work should plaintiffs prevail in this action." Id. at 317-18.

<sup>368</sup> Id. at 317.

safety, aesthetic, and pragmatic reasons" did not alter the court's view that the artists had "unfettered artistic freedom" and were independent contractors rather than employees.<sup>369</sup>

- Level of Skill. The fact that a high degree of skill was required to create the work strongly supported the plaintiffs' contention that they were independent contractors.<sup>370</sup> It was stipulated that the plaintiffs were professional sculptors, a highly skilled occupation, but the defendants contended that certain elements of the work did not require great skill and that the plaintiffs delegated certain tiling work to others.<sup>371</sup> However, the court said, "use of paid and unpaid assistants working at plaintiffs' behest and under their direct supervision does not in any way demonstrate that plaintiffs did not require skill to create the work."<sup>372</sup>
- Tax treatment of and benefits to hired parties. From 1991 to 1993, the sculptors received W-2 forms from Sig or the Limited Partnership, and taxes were withheld. Sig and/or the Limited Partnership also provided health and insurance benefits to artists until December 31, 1993. This factor favored Helmsley-Spear's contention that the Three Js were employees, but was not determinative because the plaintiffs continued to work once benefits ceased.
- Right to assign additional projects. When a party is hired to complete a specific task rather than numerous unspecified chores at the hiring party's discretion, the hired party is more likely an independent contractor than an

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<sup>369</sup> The court dismissed what it found to be Helmsley-Spear's implicit argument that, every time one hires a professional artist, one necessarily directs the artistic creation:

One can easily postulate a situation in which a person or entity employs a professional artist for a specific chore and makes as a condition of employment compliance with certain artistic directions, i.e., to sculpt a five-foot tall rendition of corporation headquarters from marble, the same material from which the real headquarters building was constructed. This was not the case here.

*Id.* at 318.

<sup>370</sup> *Id.*

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

employee.<sup>373</sup> Here, the plaintiffs were hired to complete the specific task of installing art on the property.<sup>374</sup> When they were directed once to complete a chore in another building, they refused and were not terminated or penalized.<sup>375</sup>

Next, the Helmsley court considered the remaining seven Reid factors.

- Source of instrumentalities and tools. This factor was inconclusive. Sig and/or the Limited Partnership provided the plaintiffs with some tools and materials, but the plaintiffs also used their own tools and invested thousands of dollars worth of materials for which they did not seek or receive reimbursement.<sup>376</sup>
- Location of work. This factor was not significant because the work had to be done on site.<sup>377</sup>
- Duration of relationship between the parties. The finite term of engagement, defined as the duration of a single project, was characteristic of a principal-independent contractor relationship.<sup>378</sup>
- Discretion of hired party over when and how long to work. This factor indicated independent contractor status. The plaintiffs were required to work a 40 hour week, but often worked far in excess of the contractually required hours without additional pay, with no set hours, and with 24-hour access to the property.<sup>379</sup>

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<sup>373</sup> Id. at 319.

<sup>374</sup> Id. The fact that they installed art on the property in places other than in the lobby did not alter this status.

<sup>375</sup> Id. at 319.

<sup>376</sup> Id. at 319-20.

<sup>377</sup> Id. at 320.

<sup>378</sup> Id.

<sup>379</sup> Id.

- Method of payment. The weekly checks of \$1000 to each sculptor were characteristic of an employer-employee relationship and supported Helmsley-Spear's contention that the plaintiffs were employees.<sup>380</sup>
- Hired party's role in hiring and paying assistants. The artists had complete discretion to hire unpaid assistants, but paid assistants were hired only with approval of Sig or the Limited Partnership and were paid by those entities.<sup>381</sup> This factor was indeterminate.
- Whether the work is the type of work created in the regular course of the hiring party's business. This factor favored independent contractor status. Creating works of visual art was hardly "regular business" for either Sig or the Limited Partnership.<sup>382</sup>

Finally, an additional "plus factor" tipped the balance at the trial court level in favor of independent contractor status. The artists retained copyright to the work, indicating that the parties considered the artists to be independent contractors.<sup>383</sup>

As the court observed:

Under VARA, however, the "work made for hire" analysis is undertaken for a different purpose [from that of determining owners of copyright]: The hired party's employment status is analyzed to ascertain whether a work created by that party may be considered a "work of visual art." As such, it is logical to consider copyright ownership when the "work made for hire" analysis is necessary in an action seeking protection of a work of art under VARA. Among other things,

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<sup>380</sup> The court did not accept the sculptor's argument that this was a lump sum payment apportioned over time, because the completion date was unspecified and there was no showing of a sum certain agreed to in advance. *Id.*

<sup>381</sup> *Id.* at 320-21.

<sup>382</sup> *Id.* at 321.

<sup>383</sup> *Id.* at 322.

this analysis, if helpful in a given case, can assist the Court in ascertaining how the interested parties viewed their own relationship.<sup>384</sup>

d. **Prejudice to Honor or Reputation**. Having established that the sculptural "installation was a work of visual art covered by VARA, the district court next turned to the question of whether its intentional distortion, mutilation, or modifications" . . . "would be prejudicial to the [plaintiff's] honor or reputation."<sup>385</sup>

Because the statute "does not define the terms 'prejudicial,' 'honor,' or 'reputation,'" the court construed these terms.<sup>386</sup> Starting with the language of the statute,<sup>387</sup> the court found that its terms have "readily understood meanings":

"Prejudice" is commonly understood to mean "injury or damage due to some judgment of another." Webster's Third New International Dictionary (unabridged) 1788 (1971). "Honor" is commonly understood to mean "good name or public esteem." Id. at 1087. "Reputation" is commonly understood to mean "the condition of being regarded as worthy or meritorious."<sup>388</sup>

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<sup>384</sup> Id.

<sup>385</sup> Id. at 323.

<sup>386</sup> Id.

<sup>387</sup> Id. at 323 (citing Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985) ("the starting point in every case involving construction of a statute is the language itself"); and Samuels, Kramer & Co. v. Commissioner, 930 F.2d 975, 979 (2d Cir. 1991) (plain meaning should control unless application would produce a result demonstrably at odds with legislative intent)).

<sup>388</sup> Id.

An artist's reputation need not be derived independently of the artwork that is the subject of dispute. "An author need not prove pre-existing standing in the artistic community."<sup>389</sup> In determining whether a given action is prejudicial to honor or reputation, what is protected is the artistic or professional honor of the individual as embodied in the work.<sup>390</sup>

The district court concluded that intentional alteration of the installation in the Helmsley-Spear building would injure or damage the three sculptors' good name, public esteem, or reputation in the community.<sup>391</sup> This conclusion was supported by expert witnesses' testimony.<sup>392</sup> One expert testified that the Three Js honor or reputation would be damaged if the work were modified because the work would then present to viewers an artistic vision materially different from that intended by the artists.<sup>393</sup> The court was unpersuaded by testimony to the contrary by the defendants' expert witness.<sup>394</sup>

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<sup>389</sup> *Id.* (quoting H.R. Rep. No. 514, 101st Cong., 2d Sess. 15 (1990) ("The Committee appreciates that less well-known or appreciated artists also have honor and reputations worthy of protection.")).

<sup>390</sup> *Id.* (citing H.R. Rep. No. 514, 101st Cong., 2d Sess. 15 (1990)).

<sup>391</sup> *Id.* at 323-24. The Three J's had a collective reputation generated primarily in connection with the installed work, and preexisting honor and reputation as individual artists. *Id.* at 324.

<sup>392</sup> Serving as expert witnesses for the plaintiffs were: Robert Rosenblum, art critic and professor of art history at New York University; Jack S. Shainman, director of a contemporary art gallery; and Aedwyn Darroll, professor at the Parson School of Design and Fashion Institute of Technology. *Id.* at 323-24.

<sup>393</sup> *Id.* at 324 (citing testimony of Professor Aedwyn Darroll).

<sup>394</sup> Art critic Hilton Kramer, editor of The New Criterion, testified on behalf of the defendants. The court said Kramer believed that alteration of the work "would not adversely impact plaintiffs' reputation because, in  
(continued...)

e. **Recognized Stature: A Two-Tiered Analysis.** VARA gives the author of a work of visual art the right to prevent destruction of a work "of recognized stature."<sup>395</sup> The phrase "recognized stature" is not defined in VARA. It indicates Congress' concern that destruction of art works represented a significant societal loss,<sup>396</sup> and is best viewed as a monitoring mechanism.<sup>397</sup> Protection is afforded to those works that art experts, the art community or society in general views as possessing stature.<sup>398</sup> "A plaintiff need not demonstrate that his or her art work is equal in stature to that created by artists such as Picasso, Chagall, or Giacometti," noted the court.<sup>399</sup>

For a work of visual art to be protected as a work of recognized stature under §106A(a)(3)(B), a plaintiff must make a two-tiered showing: (1) that the visual art in question has "stature," i.e., is viewed as meritorious; and (2) that this stature is "recognized"

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<sup>394</sup>(...continued)

his opinion, the artists have no reputation." Kramer based this opinion on his belief that there is no literature of any significance concerning their work. *Id.*

<sup>395</sup> 17 U.S.C. § 106A(a)(3)(B).

<sup>396</sup> 861 F. Supp. at 324 (citing H.R. Rep. No. 514, 101st Cong., 2d Sess. 16 (1990)).

<sup>397</sup> *Id.* at 325 (citing Edward J. Damich, The Visual Artists Rights Act of 1990: Toward A Federal System of Moral Rights Protection For Visual Art, 39 CATH. U. L. REV. 945, 954 (1990) (requirement would bar actions for destruction of five-year-old's fingerpainting and similar nuisance lawsuits)).

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*

by art experts, other members of the artistic community, or by some cross-section of society.<sup>400</sup> The court concluded based on expert testimony that the work in Carter was one of recognized stature.<sup>401</sup>

f. **Constitutional Arguments.** VARA survived two constitutional challenges in Carter.

(i) **Taking Argument.** Helmsley-Spear argued that, if VARA is interpreted to protect the Three Js' installation, then it violates the Fifth Amendment to the U.S. Constitution by giving a third party the right to control the use of another's property and constituting an impermissible taking.<sup>402</sup> Helmsley-Spear did not meet its burden of

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<sup>400</sup> Id. In making this showing, plaintiffs generally but not inevitably will need to call expert witnesses to testify. To obtain injunctive relief, a plaintiff must show that the defendant has commenced destruction of, or intends to destroy, the subject art work. Id.

<sup>401</sup> Professor Rosenblum testified that the sculpture is "a work of art like almost nothing I've ever seen before," and that he wants "everybody to go see it." Id. Professor Darroll said he was "very exhilarated" by the work, a "very exciting piece" of stature and tremendous imagination. Id. at 326. Kent Barwick, president of the Municipal Art Society of New York and former chairman of the New York City Landmarks Preservation Commission, testified that the Society included the installation on its tour of "noteworthy works of art and architecture" to the great excitement of the patrons, and that he considered the work to be one of the great spaces in New York. Id.

Hilton Kramer testified that the work was so lacking in merit that it served no useful purpose to retain it, but the court found his opinion "so colored by his disdain for contemporary art in general as to be of little probative value." Id.

<sup>402</sup> Id. at 326. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (writing that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"), cited in Helmsley-Spear, 861 F.Supp. at 327. See also Amicus Curiae Brief of the Real Estate Board of New York, Inc., Carter v. Helmsley-Spear, Inc., 861 F.Supp. 303 (S.D.N.Y. 1994), appeal docketed, No. 94-7990 (2d Cir. 1994).



showing that VARA effected an impermissible taking.<sup>403</sup> The waiver provision was one of three characteristics of VARA that helped the statute survive this Fifth Amendment challenge. The court noted that the statute permits contractual waiver of VARA protection.<sup>404</sup> Second, VARA applied prospectively, not retroactively.<sup>405</sup> Third, the court deemed the effect on subject property to be temporary, because VARA protection subsists only for life of the last surviving author of a covered work.<sup>406</sup> VARA met the standard enunciated in Penn Central Transportation Co. v. New York City,<sup>407</sup> in which the U.S. Supreme Court considered the New York City Landmarks Preservation Law. The Landmarks Law did not effect an impermissible taking because it: (1) implemented a comprehensive scheme designed to further the public interest; (2) did not specifically or disproportionately burden plaintiff; (3) left much of the commercial value of the property intact and did not interfere with plaintiff's primary economic use of the property; and (4) included some reciprocity of benefits.<sup>408</sup>

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<sup>403</sup> 861 F.Supp. at 328. The burden to make this argument was on Helmsley-Spear because there is a presumption that statutes passed by Congress are constitutional. Id. at 326-27.

<sup>404</sup> Id. at 328.

<sup>405</sup> Id. at 327.

<sup>406</sup> Id. at 328.

<sup>407</sup> 438 U.S. 104 (1978).

<sup>408</sup> 438 U.S. at 133-35, cited in Helmsley-Spear, 861 F. Supp. at 327-28.

Similarly, VARA creates a comprehensive scheme to protect certain artworks to advance the public interest and protect artists' rights. It does not unfairly burden property owners because it applies only to works installed after the statute's effective date, and permits those seeking to install VARA-covered works to waive VARA protection by contract. It does not diminish property values because it merely protects an installed work for the artist's life (unless the artist waives those rights).<sup>409</sup> VARA also yields reciprocal benefits in that, while artists benefit by having their work preserved and viewed as created, building owners also benefit through the societal interest in art located in their buildings.<sup>410</sup>

(ii) **Third party control.** Helmsley-Spear argued that as applied, VARA would permit a third party lessee to occupy their building permanently.<sup>411</sup> The district court rejected this argument on three grounds. First, VARA rights subsist for a limited time and are not permanent.<sup>412</sup> Second, VARA does not authorize a physical invasion; it protects works installed after the effective date of the statute.<sup>413</sup> Third, in this case VARA did not authorize the lessee to control the defendants' property, because the

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<sup>409</sup> 861 F. Supp. at 328.

<sup>410</sup> *Id.* The court noted that the property in this case "can be, and regularly has been, leased to paying tenants." *Id.*

<sup>411</sup> See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve).

<sup>412</sup> 861 F. Supp. at 328.

<sup>413</sup> *Id.*

defendants' agents were aware the work was being installed and did not object.<sup>414</sup> The property owner's cause of action would properly be against, not the VARA artist, but the third party at fault:

[T]o the extent that defendants believe that the former net lessee's actions were impermissible, they must seek redress against the former net lessee for any damages defendants claim to have sustained.<sup>415</sup>

(iii) **Vagueness.** Prior to commencement of trial, Helmsley-Spear also argued that VARA was unconstitutionally vague in that the terms "honor," "reputation," and "stature" are not defined in VARA.<sup>416</sup> The court said VARA is not unconstitutionally vague because the terms "have a common sense, easily understood meaning that should be apparent to all parties reviewing VARA."<sup>417</sup>

g. **Counterclaim: Waste.** In their counterclaim, Helmsley-Spear argued that the Three J's committed waste. They argued that the art work had materially changed the nature and character of the Queens building and caused violations of the New York City Building and Fire Code.<sup>418</sup> The court found the counterclaim was deficient.<sup>419</sup> First, an

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<sup>414</sup> *Id.* at 328-29.

<sup>415</sup> *Id.* at 329.

<sup>416</sup> *Id.* at 326 n.14. The defendants abandoned the argument following trial, but the court addressed the issue in a footnote. *Id.*

<sup>417</sup> *Id.*

<sup>418</sup> *Id.* at 334.

action for waste can be brought only by a landlord or property owner against a tenant.<sup>420</sup> The common law,<sup>421</sup> Restatement of the Law of Property,<sup>422</sup> and the New York Court of Appeals<sup>423</sup> all recognize an action in waste only in the context of a landlord-tenant relationship. Here, the counterclaim was asserted not against tenants but against independent contractors hired by the lessee and/or its agents. To the extent that an action for waste might lie, Helmsley-Spear would have to pursue that claim against its former lessee.<sup>424</sup>

Second, the sculptors' actions did not change the fundamental character of the property, a commercial building with retail and commercial space.<sup>425</sup> Third, Helmsley-Spear failed to show that the sculptural installation caused permanent damage to the building. Noncompliance with building and electric codes could be remedied without altering the artwork, and was the responsibility of the lessee, not the artists.<sup>426</sup>

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<sup>419</sup> Id. at 336.

<sup>420</sup> Id. at 334-35.

<sup>421</sup> Id. at 335 ("[E]ither the tenant does something, or fails to do something that it is obligated to do, that fundamentally changes the nature of the property that reverts to the owner at the conclusion of the tenancy.").

<sup>422</sup> See id. (citing Restatement of the Law of Property (second) § 12.2 & comment a).

<sup>423</sup> See id. (citing Rumiche Corp. v. Eisenreich, 40 N.Y.2d 174, 386 N.Y.S.2d 208, 352 N.E.2d 125 (1976)).

<sup>424</sup> Id. at 336.

<sup>425</sup> Id.

<sup>426</sup> Id.

h. **Remedies.** Having found that the Queens warehouse held a single work of art of recognized stature whose distortion or modification would be prejudicial to the artists' honor and reputation, and having rejected the defendants' challenges and counterclaim, the court turned to the scope of VARA protection and relief.

(i) **Injunction.** The plaintiffs demonstrated that, without injunctive relief, Helmsley-Spear would distort, mutilate, modify and destroy the work, so the court granted an injunction prohibiting the defendants from destroying or removing the art work. Removing the work from the lobby was not an option "because certain elements of the Work cannot be removed without being destroyed."<sup>427</sup>

(ii) **Right to complete the work.** VARA does not give artists a right to complete or continue creation of a work under the facts of this case. The artists claimed Helmsley-Spear's refusal to let them "finish" the work was in itself a "distortion," but the court said nothing in VARA compelled the defendants to allow the Three J's to engage in further creation in the lobby.<sup>428</sup>

(iii) **Damages.** Unlike a copyright infringement suit, the author of a work of visual art need not have registered that work with the Copyright Office in order to

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<sup>427</sup> *Id.* at 329.

<sup>428</sup> *Id.* The court noted that, "Like Howard Roark in Ayn Rand's *Fountainhead*, plaintiffs wish to continue creating the Work regardless of the barriers to completion that are presented." *Id.*

bring an action for infringement of the artist's moral rights.<sup>429</sup> A violation of the author's §106A rights is a copyright infringement, however,<sup>430</sup> and the author may recover actual<sup>431</sup> or statutory damages.<sup>432</sup> In this case, the artists proved that Helmsley-Spear intended to violate their VARA rights absent an injunction, but did not show any violation to date. The plaintiffs were thus not entitled to recover actual or statutory damages in connection with their VARA claim.<sup>433</sup>

(iv) **Attorneys fees and costs.** An award of costs and attorneys fees would also be inappropriate in this case.<sup>434</sup> The significance of this ruling for future VARA litigation is unclear, however, since the court noted that it was the first district court to interpret VARA issues, and attorney's fees and costs should not be awarded.<sup>435</sup>

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<sup>429</sup> *Id.* (citing 17 U.S.C. §§ 411 & 412).

<sup>430</sup> *See* 17 U.S.C. § 501(a).

<sup>431</sup> *See id.* § 504(a) & (b).

<sup>432</sup> *See id.* § 504(a) & (c).

<sup>433</sup> 861 F. Supp. at 330. Temporary alterations to the installation made by the defendants' agents were quickly remedied, and not shown to be prejudicial to the artists' honor or reputation. *Id.*

<sup>434</sup> Attorney's fees are a matter of the court's discretion. *Id.* at 330 (citing Fogerty v. Fantasy, 114 S.Ct. 1023 (1994)).

<sup>435</sup> *Id.* Such an award was also unnecessary for deterrence purposes, because Helmsley-Spear complied with all court orders. *Id.* at 330-31.

i. **Copyright Infringement Claim.** In addition to their VARA claim, the Three J's alleged that the defendants willfully infringed their copyright in the art work,<sup>436</sup> but because the sculptors never sought or obtained copyright registration in the work, the court was without jurisdiction to address the infringement claim.<sup>437</sup>

j. **The Appellate Court Decision.** On appeal, the Second Circuit reversed the lower court's grant of injunctive relief to plaintiffs, holding that the work in question was made for hire and therefore was outside the reach of VARA.<sup>438</sup>

The appellate court first applied the clearly erroneous standard and upheld the trial court's finding that the work was a single piece of art, to be analyzed as a whole under VARA. It then applied "common sense and generally accepted standards of the artistic community"<sup>439</sup> to find that the work fell within VARA's definition of "a work of visual art," notwithstanding the fact that some of the sculptural elements were affixed to utilitarian objects, including the building lobby's floor, walls and ceiling. To interpret such works as

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<sup>436</sup> *Id.* at 331. The plaintiffs sought statutory damages and attorney's fees. The artists also claimed tortious interference with contract and unlawful ejection from real property.

<sup>437</sup> *Id.* Registration is not a prerequisite to copyright protection, but is a prerequisite to a law suit for infringement for a work of United States origin. 17 U.S.C. § 411(a).

<sup>438</sup> Carter N. Helmsley-Spear, Inc., Nos. 94-7990, 94-9038, 1995 U.S. App. LEXIS 33708, at \*1 (2d Cir. Dec. 1, 1995).

<sup>439</sup> *Id.* at \*20.

works of applied art excluded from VARA's protection, said the court, would "render meaning less VARA's protection for works of visual art installed in buildings."<sup>440</sup>

Finally, the appellate court reversed the district court's determination that the work was not a "work made for hire" under the standards set forth in C.C.N.V. v. Reid.<sup>441</sup> It found that although the district court correctly stated the legal test, some of its findings were "clearly erroneous."<sup>442</sup>

The Second Circuit cited with approval the five factors established by its earlier decision Aymes v. Bonelli<sup>443</sup> as relevant in nearly all cases:

the right to control the manner and means of production;  
requisite skill; provision of employee benefits; tax treatment of  
the hired party; [and] whether the hired party maybe assigned  
additional projects.<sup>444</sup>

Applying these factors to the sculptural creation in the Carter case, the court found that plaintiffs had complete artistic freedom to create the sculpture and that great skill was required to execute the work. Both factors weighed against work for hire status.

But, the court found that the trial court erred in finding that defendants could not assign additional projects. The parties' contract gave defendant "the right to assign to

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<sup>440</sup> Id. at \*21.

<sup>441</sup> 490 U.S. 730 (1989).

<sup>442</sup> 1995 U.S. App. LEXIS 33708, at \*24.

<sup>443</sup> 980 F.2d 857 (2d Cir. 1992).

<sup>444</sup> Id. at \*24-25.



plaintiffs work other than the principal sculpture."<sup>445</sup> Moreover, defendants exercised this right: on at least three occasions, plaintiffs completed additional projects without further compensation. This fact supported an employment relationship in the court's view.<sup>446</sup>

The trial court correctly noted other factors favoring an employment status, including the provision of employment benefits and the tax treatment of plaintiffs.<sup>447</sup> Plaintiffs were paid a weekly salary and contractually agreed to work "principally for the defendants."<sup>448</sup> In addition, the artists were provided with many of the supplies used to create the sculpture. And, their period of employment was "substantial," continuing until completion of the sculpture. Finally, the artists could not hire paid assistants without the defendants' approval. The court declined to rule on whether the artists' ownership of copyright was probative of independent contractor status, but said even if it were viewed as a "plus factor," it "would not change the outcome in this case."<sup>449</sup>

Balancing the above factors, the court concluded that the sculpture in question was a work made for hire and was therefore excluded from VARA protection. It emphasized,

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<sup>445</sup> *Id.* at \*26-27.

<sup>446</sup> *Id.* at \*27.

<sup>447</sup> Defendants paid payroll and provided insurance benefits and paid vacations, and contributed to unemployment insurance and workers' compensation funds on plaintiffs' behalf. *Id.* at \*28.

<sup>448</sup> *Id.* at \*28.

<sup>449</sup> *Id.* at \*29.

however, that each case must be analyzed on its own facts and that "the existence of payroll formalities alone [are] not controlling."<sup>450</sup>

This appellate decision, dealing with a sculptural work that was created after VARA became law, limits the force of the district court decision, the only judicial opinion that heretofore protected a work of art under VARA. To date, no court decision has offered definitive guidance on the scope or operation of VARA protection.

2. **Judy Pfaff v. Denver Art Museum and Columbus Museum of Art.**

The Pfaff case<sup>451</sup> arose from a May 15, 1993 Denver Art Museum contract to engage artist Judy Pfaff as one of thirteen American artists to loan or create large scale artworks for a high profile exhibition.<sup>452</sup> In 1994, a museum employee allegedly dismantled Pfaff's sculptural work without reference to her detailed written instructions and her artwork was "permanently and irreparably destroyed."<sup>453</sup>

Pfaff filed action in U.S. District Court, claiming violation of VARA, breach of contract, negligence and breach of bailment.<sup>454</sup> Pfaff was described as an artist of

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<sup>450</sup> Id. at \*31.

<sup>451</sup> See Pfaff v. Denver Art Museum, No. 94 Civ. 9271, 1995 U.S. Dist. LEXIS 8573 (S.D.N.Y. June 20, 1995) (reporting decision denying motion to transfer venue).

<sup>452</sup> Memorandum in Opposition to Motion of Denver Art Museum to Dismiss or Transfer Action at 2, Pfaff v. Denver Art Museum (94 Civ. 9271); Complaint at 2, Pfaff v. Denver Art Museum (94 Civ. 9271).

<sup>453</sup> Complaint at 2, Pfaff v. Denver Art Museum (94 Civ. 9271).

<sup>454</sup> Id. at 3-6.

established reputation and her work as "a sculptural work of art of recognized stature".<sup>455</sup> Pfaff averred that the Denver museum infringed her moral right to the integrity of her sculpture.<sup>456</sup>

For the VARA copyright infringement, Pfaff sought either actual damages of \$175,000 (the alleged value of the sculpture) or maximum statutory damages of \$100,000, as well as costs and attorneys fees.<sup>457</sup> She demanded that the museum also pay her "the full value of the sculpture (\$175,000) plus incidental expenses and additional damages that can be shown... by reason of the fact that the Sculpture is no longer in existence."<sup>458</sup> She sought exemplary damages for "intentional, deliberate, and tortious conduct" of the defendants.<sup>459</sup> The case is pending.

### 3. Gegenhuber v. Hystopolis Productions

Gegenhuber<sup>460</sup> involved a right of attribution for design and production of professional children's puppet theater. The case confirms the continued relevance of moral

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<sup>455</sup> Id. at 1.

<sup>456</sup> Memorandum in Opposition to the Motion of Denver Art Museum to Dismiss or Transfer the Action at 9, Pfaff v. Denver Art Museum (94 Civ. 9271).

<sup>457</sup> Complaint at 8, Pfaff v. Denver Art Museum (No. 94 Civ. 9271).

<sup>458</sup> Id.

<sup>459</sup> Id. at 8-9. The pleadings allege that Denver acknowledged its fault and asked the Aetna insurance company to compensate Pfaff for her injury, but Aetna refused. Memorandum in Opposition to Motion of Denver Art Museum to Dismiss or Transfer the Action at 2, Pfaff v. Denver Art Museum (No. 94 Civ. 9271).

<sup>460</sup> 1992 U.S. Dist. LEXIS 10156 (N.D.Ill. July 10, 1992).

rights in state and common law for works not covered by VARA -- even, as the Gegenhuber court pointed out, works that might be considered "visual art."<sup>461</sup>

When plaintiffs Gegenhuber and Orthal developed two shows with Hystiopolis Productions, it was agreed that they would receive credit for their contribution in the shows' design, production and performance; but when the pair left the theater, the production company began to claim the shows as the company's sole property.<sup>462</sup> Gegenhuber and Orthal demanded attribution, and filed an action in state court. They alleged that the theater company breached an agreement that contributors would receive proper credit, and were thus "passing off" the show as theirs, a deceptive trade practice under state law.

The defendant removed the case to federal court on grounds that the plaintiffs' claims was preempted by VARA and the federal copyright law. The plaintiffs moved to remand to state court.<sup>463</sup> The court held that the plaintiffs' claims were not preempted under federal copyright law, and granted the motion to remand.<sup>464</sup> Although the plaintiffs here sought a VARA-type attribution right for "puppets, costumes and sets," which "may be copyrightable"

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<sup>461</sup> See id. at \*6.

<sup>462</sup> Id. at \*2-3.

<sup>463</sup> Id. at \*4.

<sup>464</sup> Id. at \*2.

and which arguably might be considered "visual art." VARA does not include such works.<sup>465</sup> The definition of "work of visual art," said the court:

is silent as to a whole slew of copyrightable works, including literary, musical and dramatic works, pantomimes, choreographic works, and sound recordings, presumably because these types of works are not generally perceived to be visual in nature... Thus, if a type of work is not included in the definition of 'visual art,' the copyright laws afford an author no entitlement to attribution, even where the author's work may otherwise be copyrightable.<sup>466</sup>

The court said it would not read into VARA that which Congress chose to leave out. Having included categories of works that do and do not constitute "visual art," Congress could have included works such as puppets, costumes and sets if it desired to, but by its plain language VARA does not include performance of a puppet show.<sup>467</sup> The plaintiffs claimed right of attribution for creation, design, and direction of puppet productions did not fall under VARA. The plaintiffs' claims for fair share of profits and their attempt to retrieve certain tangible items from the show also were not equivalent to one of the exclusive rights of the copyright owner under section 106.<sup>468</sup> Since none of the plaintiffs' claims were

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<sup>465</sup> Id. at \*6.

<sup>466</sup> Id.

<sup>467</sup> Id.

<sup>468</sup> Id. at \*7n.6.

preempted by copyright law, there was no basis for federal question jurisdiction, and the court returned the case to state court.<sup>469</sup>

**4. Pepe Ltd. v. Grupo Pepe, Ltd.**

Like Gegenhuber, this case illustrates the somewhat awkward relationship that exists in the copyright law between the terms "work of visual art" and "pictorial, graphic and sculptural works."<sup>470</sup>

In a case that involved blue jeans, the defendants in Pepe Ltd.<sup>471</sup> attempted to assert that, if a work in question is a "work of visual art," the plaintiffs have to allege that fewer than 200 copies have been published. The court affirmed plaintiffs' assertion that this requirement is contained in VARA but noted that "because the plaintiffs' work is excluded from the provisions of the Visual Artists Rights Act, plaintiffs need not allege this fact as an element of their cause of action."<sup>472</sup>

**5. Moncada v. Rubin-Spangle Gallery, Inc.**

As in Carter, the Moncada case<sup>473</sup> involved a VARA claim for a work created with a tenant's permission. As in Pfaff, one issue in the case was an insurance company's

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<sup>469</sup> Id. at \*7.

<sup>470</sup> See 17 U.S.C. § 101 (definitions).

<sup>471</sup> 24 U.S.P.Q. 2d 1354 (S.D. Fla. 1992).

<sup>472</sup> Id. at 1358.

<sup>473</sup> 835 F. Supp. 747 (S.D.N.Y. 1993).

refusal to pay for an action that allegedly constituted a VARA infringement. Artist Rene Moncada sued New York's Rubin-Spangle Gallery and proprietor Lynn Rubin for an alleged VARA violation and for malicious assault, interference with copyright, and conversion. In June 1991, Moncada painted one of his signature wall murals ("I am the best artist, Rene") on a building across from the Soho gallery, having obtained permission from a building tenant.<sup>474</sup> Rubin directed an employee to paint over the wall, and Moncada attempted to film her on camcorder. As Moncada looked through the viewfinder, Rubin placed her hand over the lens to prevent him from videotaping. Moncada alleged that he suffered eye injury.<sup>475</sup> Although Rubin filed a third-party complaint against Aetna Casualty and Surety Company claiming under the gallery's general liability policy, Aetna moved to dismiss on grounds that the policy did not cover Rubin's intentional act.<sup>476</sup> Rubin argued that she intended only to prevent Moncada from videotaping<sup>477</sup> but the court said injuries which flow directly and immediately from an intended act are not considered accidental<sup>478</sup> and ruled that Aetna had no duty to defend.

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<sup>474</sup> *Id.* at 748. The case does not indicate that the building was owned by Rubin or her gallery.

<sup>475</sup> *Id.*

<sup>476</sup> *Id.*

<sup>477</sup> *Id.* at 749.

<sup>478</sup> *Id.* at 750. Resolution of the VARA issues was not reported.

**6. Pavia v. 1120 Avenue of the Americas Associates**

The issue in this case was whether VARA gives artists the right to prevent the continued display, after the effective date of VARA, of works distorted, mutilated or modified before that date.<sup>479</sup> Questions concerning preemption of state moral rights laws were also raised in the case, but were not resolved.

In 1963, artist Philip Pavia was commissioned to create an art work for the lobby of the Hilton Hotel in New York City. Pavia retained title to his bronze sculpture, which consisted of three large forms and one smaller form, and registered the work for copyright protection on January 11, 1995.<sup>480</sup>

His work was displayed in the hotel lobby but, in 1988, was moved to a parking garage accessible to the public, where it was displayed in a disassembled state, with two of the forms removed. After requesting that the piece be displayed properly, Pavia filed an action in U.S. District Court for the Southern District of New York. He alleged that the improper display harmed his honor and reputation as an artist in violation of section 14.03 of the New York Arts and Cultural Affairs Law.<sup>481</sup> He also alleged that the distortion,

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<sup>479</sup> 901 F. Supp. 620, 628-29 (S.D.N.Y. 1995).

<sup>480</sup> *Id.* at 623-24.

<sup>481</sup> *Id.* at 624.



alteration, modification and mutilation of the work harmed his artistic honor and reputation in violation of VARA, as reflected in section 106A(a)(3) of the U.S. Copyright Act.<sup>482</sup>

Certain of the defendants moved to dismiss the action under Federal Rule of Civil Procedure Rule 12(b)(6).<sup>483</sup> They asserted that section 14.03 was preempted by VARA<sup>484</sup> and that Pavia's claims were further barred by the applicable statutes of limitations.<sup>485</sup>

The court granted the motion to dismiss with respect to claims arising under VARA. The court accepted for purposes of the motion that the bronze sculpture was a single "work of visual art" and that the alleged alterations of the work were acts within the scope of VARA.<sup>486</sup> It also found that the work was not outside VARA's ambit simply because it was created before VARA's effective date, because the artist had not transferred title.<sup>487</sup> The court also was not troubled by the issue of whether VARA preempts state statutes such

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<sup>482</sup> *Id.* at 627. In contrast to the New York statute, "which prohibits the improper display of altered works, VARA lays its focus on the acts of alteration themselves, without reference to subsequent display." *Id.*

<sup>483</sup> *Id.* at 622. For purposes of the motion, therefore, the court presumed factual allegations of Pavia's complaint to be true. *Id.* at 623.

<sup>484</sup> *Id.* at 626.

<sup>485</sup> *Id.* at 625, 629. Under the New York law the actionable cause was display of the altered work, not the act of dismantling it, so a new cause of action accrued each day the piece was displayed. Pavia's action commenced February 23, 1995, so improper display from February 23, 1992, and after survived the statute of limitations. *Id.*

The court did not reach the defendants' argument that Pavia's VARA claims were barred by the statute of limitations. *Id.* at 629.

<sup>486</sup> 901 F. Supp. at 628.

<sup>487</sup> *Id.* Works of visual art created before VARA's effective date are protected in if "title has not, as of such effective date, been transferred from the author." *Id.* (citing 17 U.S.C. § 106A(d)(2)).

as New York's section 14.03. Noting that whether VARA rights are equivalent to rights conferred under the New York statute for preemption purposes was a question that would "occupy courts for years to come...."<sup>488</sup> the U.S. District Court for the Southern District of New York ruled that the issue need not be confronted in the case. The alleged improper display of Pavia's work was commenced in 1988, before VARA's effective date of June 21, 1991, and VARA does not preempt state or common law for causes of action arising from undertakings commenced before its effective date.<sup>489</sup>

Pavia's claims under VARA were barred, however, because the alleged acts took place before VARA's enactment.<sup>490</sup> Unlike the New York statute, which proscribes improper display, VARA proscribes actual acts of distortion or mutilation.<sup>491</sup> "VARA does not state whether, subsequent to the commission of those acts, continued, ongoing display of the altered work of art itself gives rise to a cause of action, as does §14.03," the court said.<sup>492</sup> Noting that this was a question of first impression, the court examined the purpose and legislative history of VARA and determined that Congress could not have intended to

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<sup>488</sup> *Id.* at 626 (quoting Charles Ossola, Law for Art's Sake, *The Recorder*, Jan. 8, 1991, at 6).

<sup>489</sup> *Id.* (citing 17 U.S.C. § 301(f)(2)(A)). But see *Wojnarowicz v. American Family Ass'n*, 745 F. Supp. 130, 136 n.2 (noting before VARA's enactment that VARA "would arguably preempt state laws such as [§14.03] which currently provide similar rights."), quoted in *Pavia*, 901 F. Supp. at 627.

<sup>490</sup> *Id.* (citing VARA § 106(b)(2), 17 U.S.C. §106A note).

<sup>491</sup> *Id.* at 628 (citing 17 U.S.C. § 106A(a)(3)).

<sup>492</sup> *Id.*

give artists the right to prevent continued display after VARA's effective date of works distorted, mutilated or modified before that date.<sup>493</sup> By declining to give VARA retroactive effect, Congress "allowed those who had commissioned works before its effective date to maintain their privilege to alter those works, in line with the understanding of all parties to the pre-VARA transaction."<sup>494</sup>

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<sup>493</sup> *Id.* at 628-29.

<sup>494</sup> *Id.* at 629.

## IV. COPYRIGHT OFFICE INTERIM REPORT

### A. REQUEST FOR INFORMATION

As an initial step towards assessing the operation of VARA's waiver provisions, the Copyright Office issued a Notice of Inquiry (NOI) in the Federal Register on June 10, 1992, asking for comments about stated issues.<sup>495</sup> The comments received were relayed in the Office's interim report to Congress<sup>496</sup> on December 1, 1992.

The NOI presented several specific questions in addition to general requests for comments. Questions to the public were:

1. How can information be gathered on contracts with individual artists who are out of touch with national organizations? Should the Office hold public hearings on artist waivers? Should the Office engage an independent research firm to conduct a survey of artists (assuming funds are authorized by Congress)?
2. Should the Office conduct surveys of artists' rights in foreign countries, particularly France, Germany, and Great Britain?
3. Are there any other methods of gathering factual information about waiver of moral rights?

The Office also requested comments on the following questions:

1. What constitutes relative equivalence of bargaining power? Do even well-known artists inherently have unequal bargaining power in dealing with established museums and other organizations?

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<sup>495</sup> See 57 Fed. Reg. 24,659 (1992) (attached as Appendix part 3).

<sup>496</sup> See Interim VARA Report, *supra* note 3.

2. Are waivers of moral rights regularly included in artists' contracts? Are the parties to contracts generally aware of the provisions of the law granting integrity and attribution rights to authors? To what extent is any failure of contract language to mention waivers due to lack of knowledge about the new law?
3. How specific are the contracts? Are the works sufficiently identified? Are the uses particularly identified?
4. Do those who secure waivers exercise them or are waivers secured simply as "insurance policies?"
5. What is the ratio of attribution waivers to waivers of the right of integrity? Are waivers given for artistic work to be incorporated in buildings proportionately greater than waivers for other works?
6. In what kinds of contracts are waivers included -- contracts for sale of the work of art; for copyright ownership; to commission a work of art; stand alone waivers? Are the waivers limited in time? Do artists find any particular offers for waiver disturbing?
7. What is the economic effect of the inclusion of waiver in a contract? Does the waiver bring a separate price? Is the price of the work or other thing exchanged for value significantly lower than the market price when waiver is not included?
8. Does the artist's experience or renown have any effect on the presence, absence, or nature of a waiver in a contract? What effect?
9. Do the same factors that influence artists' decisions to waive rights of attribution and integrity influence their decisions to enter into other contracts?
10. Might constitutional problems be created by a new provision prohibiting authors from waiving their artists' rights?
11. Do public contracts differ in the extent or nature of waivers offered in contracts with artists?

## **B. RESPONSES**

We received a total of seven sets of comments. Respondents were the Nebraska Arts Council (NAC); John Henry Merryman, Stanford Law School (Merryman); Capitol Arts Center, BG-WC Arts Commission (CAC); General Services Administration (GSA); Committee for America's Copyright Community (CACC); Volunteer Lawyers for the Arts of Massachusetts, Inc. (VLA of MA); and the Volunteer Lawyers for the Arts (VLA), based in New York City. A brief review of parties' comments follows.

### **1. Nebraska Arts Council**

Among its other responsibilities, the Nebraska Arts Council contracts with artists for the acquisition of art under the state's Percent for Art Program, where works are purchased for specific sites, and are intended to constitute permanent additions to structures.

The NAC responded to the questions the Office posed in the order that the questions were presented. It commented that artists' awareness of legislation that may affect them varies; some have great knowledge, some have a smattering of pertinent information, and some have no knowledge. Some react vocally, some do not. The NAC suggested that a professional survey of waiver issues might be useful if the survey were fairly and accurately done. The organization suggested that should a survey be made, the National Endowment for the Arts and state arts agencies might provide financial resources. The NAC saw no

practical reason "to survey foreign countries when the likelihood of the data making any difference in current U.S. legislative and judicial practices [is] negligible."<sup>497</sup>

Regarding the additional questions the Office presented, NAC observed that better-known artists have greater bargaining power in contractual negotiations than do lesser-known or unknown talents. The NAC said it does not provide for contractual waiver of artists' rights as outlined by VARA. However, the organization does include language identifying works specifically and defining an artist's legal rights in contracts for works that are intended to become part of a structure. The artists retain all rights conferred by the Copyright Act in their works except ownership and possession. In addition, the NAC said it retains a license to make certain photographic or graphic reproductions of commissioned works for noncommercial purposes. The NAC reported that artists generally have no problem "with this type of waiver if they are properly credited and also retain the right to use reproductions of the purchased work in their own marketing materials, in which case the state of Nebraska asks for proper credit."<sup>498</sup>

## **2. Professor John Henry Merryman**

John Henry Merryman, Sweitzer Professor of Law, Emeritus, Stanford University, offered several interesting comments and suggestions. He observed that "the moral right can

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<sup>497</sup> Comment letters in response to Request for Information 92-2, Waiver of Moral Rights in Visual Artworks. (Nebraska Arts Council Comment Letter at 1).

<sup>498</sup> Nebraska Arts Council Comment Letter at 3.

be seen as serving only one interest, that of the artist, or a combination of two interests, those of the artist and the public."<sup>499</sup> He noted that the federal moral right appears to protect only the artist's interest; thus, "the existence of a power of waiver seems...to be reasonable."<sup>500</sup> Regarding concerns about contractual provisions and artists' unequal bargaining powers, Merryman said "in my experience these concerns are vastly exaggerated by sentimentalists whose fervor is inversely proportional to their familiarity with the art world."<sup>501</sup>

As to the extent waiver clauses are used in artists' contracts, Merryman offered what he called "only impressionistic evidence."<sup>502</sup> He said most artists who participate significantly in the art market tend to dislike written agreements, and sell or consign their works without using written contracts. Further, he said, "artists I know who use written contracts are represented by dealers who are fully capable of protecting the artist's moral right against waiver if the question is raised by a potential purchaser."<sup>503</sup> Merryman added that VARA seems to provide adequate provisions for situations in which complex contracts may be made for commissioned works intended for installation in or around buildings.

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<sup>499</sup> Merryman Comment Letter at 1.

<sup>500</sup> *Id.*

<sup>501</sup> *Id.*

<sup>502</sup> *Id.*

<sup>503</sup> *Id.* at 20.



### **3. Capitol Arts Center, BG-WC Arts Commission**

A representative of the CAC favored inalienable moral rights. He did not believe "that the waiver principal should be used as a bargaining chip for unscrupulous publishers and promoters. The artist should be in charge of his or her rights and free from pressure to give them up."<sup>504</sup>

### **4. General Services Administration**

The GSA commented that it operates its Art-in-Architecture Program as a commissioning entity for federal buildings nationwide. Because it works by contract with participating artists, its interests are affected by passage of VARA. The GSA contract typically contains moral rights provisions that include attribution and integrity. Regarding the integrity of the commissioned artwork, GSA commented "our past contracts state that the artwork becomes the property of the government but the copyright belongs to the artist."<sup>505</sup> However, reproduction or exhibition of a work may not occur without permission of the government.

The GSA said that it was reviewing VARA to determine whether changes must be made to implement the waiver option for artists. If GSA determines that waiver language is

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<sup>504</sup> Capitol Arts Center, BG-WC Arts Commission Comment Letter at 1.

<sup>505</sup> General Services Administration Comment Letter (interim) at 1.

required, the waiver option would become part of the standard contract, knowingly signed by artists.<sup>506</sup>

The GSA offered to assist the Office with further research into issues raised by passage of VARA by providing access to the Art-in-Architecture Program's National Artist Slide Registry.

#### **5. Committee for America's Copyright Community**

The CACC represents a wide range of copyright industries, including publishers of books and magazines as well as producers of computer software, sound recordings, motion pictures, advertising and communications systems. The CACC opposed legislative proposals to apply moral rights across a broad range of copyrightable works. In its view, "such proposals could threaten the constitutional goals of promoting the production and dissemination of copyrighted works and the traditional practices and relationships that are fundamental to the daily operation of copyright-intensive industries in the U.S."<sup>507</sup>

The Community urged the Copyright Office to focus only on waivers of moral rights in visual artworks under VARA, and warned that Congress, in passing the Act, did not intend that such rights should be extended to collaborative works.<sup>508</sup>

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<sup>506</sup> The contract that resulted from this review contains a waiver provision. See infra Ch. VII, notes 622-26 and accompanying text.

<sup>507</sup> Committee for America's Copyright Community Comment Letter at 1.

<sup>508</sup> Id. at 2.

**6. Volunteer Lawyers for the Arts of Massachusetts, Inc.**

VLA of MA is a "non-profit organization established to provide access to legal services, and advocacy, for artists and non-profit cultural organizations."<sup>509</sup> In response to the NOI, VLA of MA prepared and conducted a survey of artists it considered might be impacted by the provisions of VARA. The sample included well established, working artists with local and regional reputations for their works of visual art. The group provided the Copyright Office with copies of both the survey and the survey results. The results were enlightening as much for the responses of those surveyed as for the simple numbers: about 60 questionnaires were sent out and 22 completed questionnaires were returned. The results showed that most artists surveyed had little experience with contracts dealing with moral rights issues. Explanations could include the fact that VARA and its waiver provisions were still new; in addition, many artists do not use written contracts.

Regarding artists' experiences with waiver of moral rights provisions, VLA of MA reported the following:

Although only a minority of the responding artists have actually been asked to waive their moral rights, the vast majority say they would not be willing to do so. Of those who said they would be willing to waive their moral rights, the factors that would influence this decision varied. Some said they would do so for money or the opportunity; others would

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<sup>509</sup> Volunteer Lawyers for the Arts of Massachusetts, Inc. Comment Letter at 1.

agree to waive their rights on commissioned works, public works, and temporary pieces.<sup>510</sup>

#### **7. Volunteer Lawyers for the Arts (New York)**

VLA endorsed passage of VARA, but found the waiver provision to be threatening to artists. VLA opined that the waiver provision may allow artists to "relinquish their moral rights -- perhaps even before they realize that they have them."<sup>511</sup> VLA suggested that the United States should not allow the moral rights provisions of integrity and attribution to be waived; thus, VLA proposed that the waiver provision of VARA be repealed.

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<sup>510</sup> *Id.* at 2.

<sup>511</sup> Volunteer Lawyers for the Arts (New York) Comment Letter at 1.

## V. COPYRIGHT OFFICE SURVEY AND FINAL REPORT

### A. OUTREACH

#### 1. The Interim Report

As discussed in Chapter IV, the Copyright Office's interim VARA report to Congress reflected a relatively limited inquiry. VARA had been in effect only two years and there were few, if any, measurable effects of the new grant of rights. In response to our Notice of Inquiry published in the Federal Register and mailed to interested parties,<sup>512</sup> the Office received seven comments. The comments naturally reflected limited experience and in some cases restated policy arguments and points of view considered when VARA was enacted. The interim study therefore served as a transition from the legislation's history and purpose to a study of the legislation's impact. The stage was set for the full report to Congress.

#### 2. The Full Report

For this final report to Congress, the Copyright Office conducted a significantly broader outreach. The Office attempted to reach artists and others in the visual arts community by targeting the associations and publications that serve that community. In so doing, the Office hoped to reach artists through more likely venues than the Federal Register. Moreover, the Office decided in favor of a simple but comprehensive questionnaire, rather

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<sup>512</sup> The notice was mailed to more than 50 arts groups and individuals.

than a request for formal written comments from interested parties.<sup>513</sup> Although any additional written comments were welcome, the Office's primary tool for gathering data about artists' experiences with the waiver provisions of VARA was the survey.

In June of 1994, the Office began to prepare a survey to be distributed across the country to visual artists, art lawyers, agents, dealers, associations, and others who work with visual artists. The survey was distributed through a network of state art councils, volunteer lawyers for the arts, and art schools, as well as various national arts organizations. A brief article describing the VARA survey and inviting artists to contact the Office for a copy was circulated to these organizations for inclusion in their publications.

The survey was designed to reveal how VARA and its waiver provisions have affected visual artists to date. The survey began with a brief explanation of VARA and attached relevant excerpts from the statute. The Office anticipated that an important ancillary function of the survey would be an educational one, since many artists might be unaware of their new rights under VARA. It framed the questionnaire in layman's language, and where possible, requested "yes" and "no" or multiple choice answers, with additional space provided at the end for comments.<sup>514</sup>

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<sup>513</sup> The Copyright Office survey was based in part on two prior surveys. The first model was the "Volunteer Lawyers for the Arts Visual Artists Rights Act of 1990 Questionnaire" developed by the Massachusetts and New York VLA, reprinted in Interim VARA Report, *supra* n.3. A second model survey was developed by Carol Mack, Esq., a former intern in the General Counsel's office of the U.S. Copyright Office. Additional questions were added by Copyright Office staff, who edited and restructured the survey.

<sup>514</sup> See *infra* section B (discussing design of the survey).

The Office circulated the draft survey to a pool of copyright and visual arts experts including law professors, attorneys, museum directors, and art association directors. Almost uniformly, the experts believed the survey should be divided into distinct sections, or parts that would be answered only by visual artists, and parts that could be answered by all participants. A few experts suggested additional art organizations who should receive the survey.<sup>515</sup>

When the VARA survey was in final form, the Copyright Office distributed it to hundreds of art-related organizations. The network consisted primarily of state art councils, volunteer lawyers for the arts,<sup>516</sup> and art schools and universities. The Office additionally sought the participation of other art organizations.<sup>517</sup> The Office sent surveys to those groups who, contacted by letter and telephone, expressed a willingness to participate. Most of these groups in turn agreed to disburse multiple copies of the survey to their members. Other organizations agreed to include in their newsletters a Copyright Office article

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<sup>515</sup> One expert suggested that The Office contact the top 500 U.S. corporations, because corporate commissions and investments represent an important part of the art market. Letter from John Henry Merryman to Marybeth Peters (Aug. 16, 1994). The Office considered this an excellent suggestion, but one which was not feasible because of limited resources.

<sup>516</sup> For a complete listing, see VOLUNTEER LAWYERS FOR THE ARTS NATIONAL DIRECTORY (8th ed. 1994) (obtained through the courtesy of Washington Area Lawyers for the Arts (WALA)).

<sup>517</sup> These included the National Endowment for the Arts; National Artists Equity; General Services Administration; Visual Artists & Galleries Association (VAGA); Federation of Modern Painters & Sculptors; New York Foundation for the Arts; American Society of Media Photographers, Inc. (ASMP); Artists Rights Society; American Association of Museums; College Art Association; National Association of Schools of Art & Design; The Association of Independent Colleges of Art & Design; American Print Alliance; Art Dealers Association of America.

describing the VARA study. This one-page article encouraged artists and others to contact the Office directly for a copy of the survey.<sup>518</sup> In response to this article, more than 50 individual artists wrote or telephoned the Copyright Office to request a copy of the survey.

The Office mailed 6,800 surveys; many of these were reported to be duplicated in the hundreds by their recipients. The Office received responses from 21 Volunteer Lawyers for the Arts groups, 42 state arts councils, and 55 art schools.

Another component of the Office's outreach efforts on the VARA study was discussions with artists. Members of art organizations met with Copyright Office staff.

The Office participated in a panel discussion on VARA, co-sponsored by Washington Area Lawyers for the Arts (WALA), National Artists Equity (NAE), and National Endowment for the Arts (NEA),<sup>519</sup> and Volunteer Lawyers for the Arts of Massachusetts, Inc., presented three panel discussions in their geographical region.

## **B. DESIGN OF THE SURVEY AND METHOD OF COMPUTING RESULTS**

The Copyright Office survey on waivers of moral rights in visual art was designed to ascertain how artists are affected by the waiver provisions in VARA. The primary goal of the survey was to determine whether waivers routinely occur in art contracts as a result of

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<sup>518</sup> Reproduced in Appendix Part IV, at P. 55.

<sup>519</sup> An Office attorney also spoke on September 27, 1994, at the Maryland College of Art and Design, and distributed copies of the VARA survey to the students and administrators present.



the parties' relative bargaining power. The survey also inquired whether waivers occur only in the context of written contracts, as the statute requires.

As recommended by the panel of reviewing experts, the survey was structured in four parts. All participants were asked to answer Parts I and III, while Part II was intended only for visual artists affected by VARA (i.e., authors of a "work of visual art").<sup>520</sup> Part IV simply provided space for any additional comments and was optional. The survey was prefaced with a statement of purpose and instructions, and relevant excerpts from the statute were printed on the back of the final page.

Artists and other participants were asked to check their appropriate responses or to complete their answer in the space provided. In the familiar format of a multiple choice questionnaire, the survey sought in many cases a simple "yes," "no" or "not applicable" ("n/a" or "don't know"). Some questions called for a brief written response. The Office sought simplicity and clarity in its presentation and polling results.

The content of the survey reflected its goals. Part I inquired whether the participant had been aware, prior to receiving the survey, of the moral rights of attribution and integrity newly established in 17 U.S.C. § 106A. The Office anticipated that an important ancillary function of the survey would be an educational one, since many artists may previously have

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<sup>520</sup> The survey stipulated that:

A VARA visual artist is one who creates a painting, drawing, print, sculpture, or still photographic image for exhibition purposes in a single copy or limited edition of 200 copies or fewer that also meets the other criteria set out in 17 U.S.C. § 101.

been unaware of their rights under VARA. Part I therefore highlighted the limited application of VARA to the fine arts by inquiring whether the participant was a "visual artist" as envisioned by VARA and if not, exactly what was the participant's connection to the art world (e.g., arts lawyer, professor, dealer, or artist who creates works not covered by VARA).

Part II was aimed specifically at VARA visual artists. In this section, the survey asked about the artists' backgrounds, their professional experiences, and any concrete experiences with contractual waivers of moral rights. It began by asking respondents about their type of artwork, state of residency, representation by agent or gallery, and gross income from artwork. Next, it asked whether they had ever waived rights to attribution or integrity in a signed contract; and, if so, how many times and for what reasons. Part II posed the fundamental question of whether the artist had ever experienced pressure or coercion to waive these rights, and, if so, how. It also inquired whether the artist would be willing to waive these rights in future contracts and, if so, for what reasons.

Part III asked all participants to describe art contracts in general, to describe the art-related contracts they personally had entered, and to describe in particular any waiver provisions they had encountered.

Finally, Part IV requested any additional comments that participants wished to provide on the issues addressed in the survey.

To compute the results from the survey, the Office first produced a simple tabulation of the gross responses of each survey question. Responses to questions directed to only a particular respondent group were narrowed and ineligible responses were excluded from tabulation of that question.<sup>521</sup> This broad tabulation provided a frame of reference for multiple question comparisons.

Next, we compared the tabulated responses to a variety of different questions. Several questions were analyzed within the scope of specific response groups, such as those whose art provides less than \$10,000 annually. From these comparisons, a set of tables was created to compare how responses to certain questions differed among the various response groups. At this point, patterns of moderately specific attitudes from certain respondent groups began to emerge, but a more focused analysis was desired.

We conducted additional comparisons designed to address five specific categories: awareness of moral rights and how they operate under VARA; the frequency with which artists are asked to waive moral rights; the effect of such waivers on artists' bargaining positions; the actual content of existing waiver clauses; and how commission contracts

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<sup>521</sup> Thus, since all Part II questions were designated for those who answered "yes" to question 3a, responses by respondents answering "no" to 3a were edited from Part II. Similarly, since question 3b was designated only for those who answered "no" to question 3a, all responses from those answering "yes" to 3a were edited from the 3b tabulation.

compare to other artists' contracts in relation to these categories. New tables were generated consistent with these five categories and are included in this report.<sup>522</sup>

The final analysis is expressed in terms of percentages. To obtain as pure a percentage as possible, surveys which did not respond to a particular question were excluded from that particular percentage base. Where the number of non-responses was significant, or perhaps indicative of confusion or some other relevant attitude, those numbers were noted or analyzed in the tables.

Occasionally a substantial number of respondents replied "don't know" to certain questions. In order to preserve the integrity of the percentage expression, these answers were sometimes excluded by identifying only those respondents "expressing an opinion." However, where relevant, those responses were analyzed and included in the tables.

### **C. RESULTS FROM THE SURVEY ON THE VARA WAIVER PROVISION**

The survey conducted by the Copyright Office reports information addressing five general topics:

- (1) the general awareness of artists and those associated with the arts community of the moral rights granted by VARA, and specifically of an artist's ability to waive those rights in a written agreement;
- (2) the frequency with which moral rights waiver clauses appear in written artists' agreements;

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<sup>522</sup> See infra section C.2 - C.5.

- (3) the effects of such waivers on artists' bargaining positions;
- (4) the actual content of existing waiver clauses; and
- (5) how commission contracts compare to other artists' contracts with respect to the previous categories.

## 1. Respondent profile

The survey elicited 1061 written responses from persons living in 47 states and the District of Columbia.<sup>523</sup> Nine hundred fifty-five respondents said they were "visual artists," that is authors of a "work of visual art" as defined by copyright law.<sup>524</sup> The 103 respondents who said they were not visual artists under VARA all shared a professional connection to the arts community, occupying a wide variety of positions. Most respondents'

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<sup>523</sup> One hundred forty-five respondents did not provide their resident state. Also, eight surveys were received after the May 26, 1995 deadline, and were not included in the survey analysis.

<sup>524</sup> See 17 U.S.C. § 101. Nine hundred forty-four actually marked "yes," indicating they were VARA artists. Eleven (11) others were left blank, but a "yes" response was inferred from several factors. First, only those who marked "yes" to this question were asked to complete part II of the survey, so a completed part II tended to indicate that the respondent considered herself a "visual artist." Second, question four (a question reserved only for "visual artists") inquires what type of artwork the respondent creates. Respondents that create paintings, sculptures, drawings, and prints are likely to be covered by VARA.

Similarly, nine respondents who left this question blank were inferred to have answered "no." If a respondent did not answer part II, but resumed answering part III, that respondent followed the intended response pattern of a non-VARA artist. Each of these respondents also classified themselves as something other than an artist, e.g., museum director or art lawyer, in question 3b.

These conclusions were reached conservatively. If the respondent proceeded as if he or she had answered "yes" to the question "Do you feel you are covered by that definition?" and no other evidence indicated otherwise, the Office inferred a "yes" answer. Three respondents answered in a manner that implied neither answer, and these answers were excluded from both the visual artist and non-visual artist sub-categories. The Office hoped to clarify the sub-category consisting of visual artists while maintaining the largest possible base. This became increasingly important during the cross-indexing process, when a substantial number of multiple question analyses relied on the visual artists sub-category.

artwork produced less than \$10,000 annual gross income, and most derived income from other sources. The 955 visual artists instructed to complete part II of the survey were asked:

**Q: In an average year, how much gross income does your art work provide?**

|              |     |              |     |
|--------------|-----|--------------|-----|
| \$0-10,000:  | 73% | \$10-25,000: | 11% |
| \$25-40,000: | 5%  | \$40,000+:   | 4%  |
| none:        | 3%  | No response: | 4%  |

**Q: Does sale of your work provide your sole income?**

Yes: 10%    No: 87%    No response: 4%

## **2. Awareness**

Seventy-three percent of respondents said that before receiving the survey they were aware that artists who created certain works of visual art had moral rights in those works. Forty-one percent of respondents said that before receiving the survey they were aware that moral rights could be waived. Thirty-two percent said that they knew moral rights could be waived only by an express written agreement signed by the artist and specifying the work and uses of the work to which the waiver applies. Awareness of the waiver provision and how it operates under the VARA was greater where a respondent was represented by an agent or artist's representative, where a respondent's art provided annual gross income exceeding \$25,000, where a respondent's art provided his or her sole income, and where an artist was commissioned more than fifteen times annually to create works of art.

Awareness of moral rights was generally greater among artists from those states that had enacted moral rights statutes prior to VARA. However, awareness that VARA rights

could be waived in an express written agreement was no greater among artists from those states.

**TABLE 2: Awareness**

| Category of Respondents  | Aware of Moral Rights |       | Aware they can be waived |       | Aware Waiver Must be Written & Express |       |
|--|-----------------------|-------|--------------------------|-------|--|-------|
|  | %                     | Base* | %                        | Base* | %                                      | Base* |
| Total respondents  | 73                    | 1054  | 41                       | 1046  | 32                                     | 1037  |
| Those with no representative   | 70                    | 420   | 41                       | 417   | 33                                     | 414   |
| Those represented by an agent or artists' representative   | 77                    | 148   | 48                       | 147   | 42                                     | 147   |
| Those represented by a gallery   | 75                    | 434   | 40                       | 430   | 30                                     | 427   |
| Those whose art provides gross income exceeding \$25,000 annually  | 74                    | 90    | 56                       | 90    | 45                                     | 89    |
| Those whose art provides gross income less than \$25,000 annually (including no annual income)             | 72                    | 820   | 39                       | 813   | 31                                     | 797   |
| Those whose art provides their sole income   | 74                    | 92    | 48                       | 91    | 38                                     | 89    |
| Those whose art does not provide their sole income   | 73                    | 822   | 40                       | 816   | 31                                     | 811   |
| Those who have never been commissioned to create a work of art   | 74                    | 259   | 37                       | 259   | 28                                     | 262   |
| Those who are annually commissioned to create works of art   | 72                    | 647   | 42                       | 641   | 34                                     | 635   |
| Those who are annually commissioned to create more than fifteen works                                      | 72                    | 47    | 50                       | 46    | 41                                     | 46    |
| Visual artists residing in states with pre-VARA moral rights statutes                                      | 76                    | 329   | 40                       | 326   | 31                                     | 322   |
| Visual artists residing in states with pre-VARA moral rights statutes containing written waiver provisions | 75                    | 220   | 39                       | 218   | 31                                     | 216   |

\* Base excludes surveys which did not respond to the particular question being analyzed.

### 3. Frequency of Waiver Clauses

Seventeen percent of respondents said they had seen contracts containing a clause waiving an artist's moral rights in a work of visual art. Seven percent of all respondents expressing an opinion said such clauses are routinely included in artists' written contracts. Of those respondents who stated that said they had seen moral rights waiver clauses, 13 percent reported such clauses are routinely included.

Twenty percent of respondents said moral rights waiver clauses are included in contracts for sales of existing artwork, and 39 percent said they are included in contracts for commissioned work. Eight percent of respondents who said they were covered by VARA ("VARA artists") had waived moral rights, and 23 percent knew of other artists who had been asked to waive moral rights.

**TABLE 3-1: Frequency of Waiver Clauses**

| <i>Category of Respondents</i>   | <i>%</i>  | <i>Base*</i> |
|--|-----------|--------------|
| <i>Respondents who have seen moral rights waiver clauses</i>   | <i>17</i> | <i>1019</i>  |
| <i>Those expressing an opinion who say that waivers are routinely included in artists' contracts</i> | <i>7</i>  | <i>489</i>   |
| <i>Those who have seen waivers and say they are routinely included in artists' contracts</i>         | <i>13</i> | <i>177</i>   |
| <i>Total Respondents who say waivers are routinely included in artists' contracts</i>                | <i>3</i>  | <i>1017</i>  |
| <i>Respondents who say waivers are included in contracts for sales of existing artwork</i>           | <i>20</i> | <i>373</i>   |
| <i>VARA Artists who have waived moral rights</i>   | <i>8</i>  | <i>955</i>   |
| <i>VARA Artists who know of other artists that have been asked to waive moral rights</i>             | <i>23</i> | <i>955</i>   |

\* Base excludes surveys which did not respond to the particular question being analyzed.



Sixty-one percent of respondents who expressed an opinion said oral contracts are most common in the art world, and thirty-nine percent said written contracts are most common.<sup>525</sup>

**TABLE 3-2: Frequency of Written Contracts**

| <i>Base: 754</i>  | %  |
|---|----|
| <i>Respondents who said oral contracts are most common in the art world</i> | 61 |
| <i>Respondents who said written contracts are most common</i>               | 39 |

\* Base excludes surveys which did not respond to the particular question being analyzed, as well as those which responded "don't know."

#### **4. Effect of Waiver on Artists' Bargaining Position**

Eight percent of respondents who said they were covered by VARA ("VARA artists") reported they would be willing to waive their moral rights in future contracts, and 42 percent did not know whether they would be willing to do so. Those who had previously waived their moral rights in a signed contract were three times as willing to waive in the future as compared to total VARA artists.

Thirteen percent of VARA artists said they have turned down an offer because the contract included a waiver of moral rights, and 14 percent said they have insisted that a waiver clause be struck from a contract before agreeing to sign it. A VARA artist was more likely to have turned down an offer including a moral rights waiver and to insist such a waiver be struck if he or she was represented by an agent or an artist's representative, the art

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<sup>525</sup> Because moral rights waivers must be written, oral contracts cannot contain effective waivers; it follows that, if most art contracts are oral, most do not include moral rights waivers.

produced more than \$25,000 annually or provided the artist's sole income, or the artist had previously waived moral rights in a signed contract.

**TABLE 4-1:**

| Category of VARA Artist   | Willing to waive in future |            |       | Have turned down offer |       | Have insisted waiver be struck |       |
|---|----------------------------|------------|-------|------------------------|-------|--------------------------------|-------|
|   | yes                        | don't know |       |                        |       |                                |       |
|   | %                          | %          | Base* | %                      | Base* | %                              | Base* |
| Total VARA Artist respondents                                     | 8                          | 42         | 888   | 13                     | 862   | 14                             | 869   |
| Those whose art provides their sole income                        | 9                          | 34         | 90    | 34                     | 89    | 30                             | 91    |
| Those whose art does not provide their sole income                | 8                          | 43         | 781   | 11                     | 769   | 12                             | 772   |
| Those whose art provides gross income exceeding \$25,000 annually | 7                          | 37         | 89    | 27                     | 86    | 33                             | 87    |
| Those whose art provides gross income less than \$25,000 annually | 8                          | 43         | 779   | 12                     | 768   | 12                             | 772   |
| Those represented by an agent or artists' representative          | 8                          | 45         | 142   | 24                     | 144   | 23                             | 140   |
| Those represented by a gallery                                    | 7                          | 42         | 410   | 12                     | 408   | 15                             | 410   |
| Those with no representation                                      | 9                          | 42         | 406   | 14                     | 395   | 12                             | 398   |
| Those who have waived moral rights in a signed contract           | 25                         | 59         | 73    | 36                     | 77    | 43                             | 74    |

\* Base excludes surveys which did not respond to the particular question being analyzed.

Fifty-five percent of VARA artists who expressed an opinion said that in their experience a rejection of a request for a waiver of moral rights usually means there will be no deal; however, of all VARA artists responding, only 17 percent believed a rejection would defeat the art sale, and 69 percent said they did not know.

Six percent all of responding VARA artists said they had been pressured or coerced into waiving their moral rights. Of VARA artists who had seen contracts containing moral rights waiver clauses, 24 percent said they had been pressured or coerced to waive.

**TABLE 4-2:**

| <i>Category of VARA Artists</i>  | <i>Those Believing<br/>Rejection of waiver<br/>request means no deal</i> |                   |             | <i>Those Pressured<br/>coerced into<br/>waiving</i> |             |
|--|--|-------------------|-------------|---|-------------|
|  | <i>Yes</i>   | <i>don't know</i> |             |   |             |
|  | <i>%</i>   | <i>%</i>          | <i>Base</i> | <i>%</i>  | <i>Base</i> |
| <i>Total VARA Artists responding</i>                                       | 17   | 69                | 857         | 6   | 881         |
| <i>Those expressing an opinion</i>   | 55   | n/a               | 269         | 24  | 144         |
| <i>Those who had seen contracts containing moral rights waiver clauses</i> | 43   | 30                | 144         | 24  | 144         |

### **5. Content of Waivers**

Of those respondents who had seen waivers and expressed an opinion regarding the following, 60 percent said the waivers they had encountered specifically identified the work and the uses of that work to which the waiver applies; 66 percent said the works for which waivers were requested were sufficiently identified; 46 percent said the uses of the works were sufficiently identified; 35 percent said contracts contained a separate price for the waiver moral rights; and 26 percent said waivers were usually limited in time.

**TABLE 5-1:**

| <i>Respondents who had seen waivers and expressed an opinion as to:</i>   | <i>%</i> | <i>Base*</i> |
|---|----------|--------------|
| <i>Whether moral rights waivers encountered specifically identified the works and uses to which waiver applies</i>            | 60       | 151          |
| <i>Whether moral rights waivers encountered sufficiently identified the works for which waivers are requested</i>             | 66       | 134          |
| <i>Whether moral rights waivers encountered sufficiently identified the uses of the works for which waivers are requested</i> | 46       | 136          |
| <i>Whether contracts include a separate price for waivers</i>   | 35       | 136          |
| <i>Whether waivers are usually limited in time</i>  | 26       | 95           |

\* Base excludes surveys which did not respond to the particular question being analyzed, and those that responded "don't know" or "N/A."

Of those respondents expressing an opinion, 43 percent said the integrity right was waived more often than the attribution right; 34 percent said the attribution right was waived more often than the integrity right; and 23 percent said neither right was waived more often than the other.

**TABLE 5-2:**

| <i>Base: 111*</i>  | <i>%</i> |
|--|----------|
| <i>Respondents who say the right to integrity is waived more often</i>   | 43       |
| <i>Respondents who say the right to attribution is waived more often</i> | 34       |
| <i>Respondents who say neither right is waived more often</i>            | 23       |

\* Base excludes surveys which did not respond to the particular question being analyzed, and those that responded "don't know")

## VI. COPYRIGHT OFFICE PUBLIC HEARING AND REQUEST FOR COMMENT

The Office published a Notice of Hearing and Request for Public Comment in the Federal Register on May 23, 1995.<sup>526</sup> It anticipated that the hearing would provide an opportunity to supplement knowledge of existing practices relating to waivers of moral rights in visual art gained through the VARA survey. The Office also requested copies of as many visual arts contracts as possible, especially those containing waivers.<sup>527</sup> Specifically, the Copyright Office invited comments on artists' awareness of VARA rights; the extent to which waivers are routinely included in artists' contracts; contract specifics, such as the economic effect of a waiver in the course of negotiations; bargaining power and other factors artists consider in deciding whether to agree to a waiver of moral rights in a contract; experiences in other countries; and whether VARA should be amended or modified in any way.<sup>528</sup>

### A. THE PUBLIC HEARING

The public hearing on the effect of the VARA waiver of moral rights provisions was held in the Copyright Office on June 21, 1995.<sup>529</sup> Participants included a Copyright Office panel and witnesses grouped into four panels. Panel 1: Gilbert Edelson, Administrative Vice President

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<sup>526</sup> 60 Fed. Reg. 27,329 (1995).

<sup>527</sup> *Id.* at 27,3331, 27,332. *See infra* Ch. VII (discussing artists' contracts).

<sup>528</sup> 60 Fed. Reg. at 27,332.

<sup>529</sup> A complete transcript summary of the hearing is included as Part IX of the Appendix, at 55.

& Counsel, Art Dealers Association of America; Rockne Krebs, Artist, Sky Studios; Carol Pulin, Director, American Print Alliance; Panel 2: Edward Damich, Professor of Law, George Mason University, and Board Member, Washington Area Lawyers for the Arts; Deborah Benson, Esq., Morse, Altman, Dacey & Benson, and Board Member, Massachusetts Volunteer Lawyers for the Arts; Richard Altman, Esq., Attorney, New York Volunteer Lawyers for the Arts; Panel 3: Dale Lanzone, Director, Cultural and Environmental Affairs Division, General Services Administration; Barbara Hoffman, Esq., General Counsel, College Art Association; John Koegel, Esq., Arts Attorney; Panel 4: John J. McGreevy, Esq., Hughes, Hubbard & Reid; John Meade Swing, Artist, the Three J's; John Veronis, Jr., Artist, the Three J's; Thomas Schwartz, Vice President, Helmsley-Spear; Adrian Zuckerman, Esq., Davidoff & Malito. The salient points made at the hearings and in written comments are summarized below.

An Office panel consisting of Register of Copyrights Marybeth Peters, Acting General Counsel Marilyn Kretsinger, and Acting Policy Planning Advisor Charlotte Douglass questioned the witnesses. Register Peters noted that a key issue in enacting VARA was whether the moral rights of attribution and integrity should be waivable. Congress expressed concern that waivers might be obtained automatically due to artists' unequal bargaining power and asked the Copyright Office to study the effect of the waiver provision. The hearing would therefore focus on these issues.

## **1. The First Panel**

The first witness was Carol Pulin, Director of the American Print Alliance.<sup>530</sup> Pulin asserted that printmakers are more vulnerable to copyright and VARA infringements than are other VARA artists, because the public often thinks of prints as mere reproductions. Even where permission for reproduction is granted, images are frequently modified; overprinting and cropping are common.<sup>531</sup> Pulin believed that artists hesitate to prosecute VARA violations due to lack of economic resources and fear of retaliation.

Pulin advocated educating artists about VARA through the Copyright Office, arts groups, art magazines and newspapers. An information sheet could be distributed through art schools and included in computer software packages used to reproduce or modify pre-existing images. She suggested developing a notice, similar to notice of copyright, to indicate whether moral rights in a work have been waived.

The next witness, Gilbert Edelson, is Administrative Vice President of the Art Dealers Association of America, and Chair of the Art Law Committee of the Association of the Bar of the City of New York. Edelson distinguished between "moveables" (such as paintings, drawings, prints) and major commissioned works (such as murals, installations, or monumental

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<sup>530</sup> The American Print Alliance is a nonprofit consortium of printmaker councils representing about three thousand artists.

<sup>531</sup> Register Peters asked Pulin if she thought a license under section 106(1) to reproduce a work in a catalogue might imply certain leeway under the section 106(2) derivative works right. Pulin said the right to reproduce a work in a catalogue was simply that, and did not imply a right to modify or to create further works, such as notecards, to sell at the exhibit.

sculpture). Waivers of moral rights in moveables are not favored or sought by art dealers or art lawyers, according to Edelson. He would advise any artist not to waive rights in a painting. In fact, he said, written agreements are rare for such art transactions. In contrast, Edelson expected the number of waiver requests for commissioned permanent or installed works to increase as a result of the widely-publicized decision in Carter v. Helmsley-Spear. Real estate builders and developers may want to protect their investments against works that may be viewed negatively by future tenants or prospective purchasers.

Edelson predicted that repeal of the waiver provision for immoveables, would have an adverse effect on art with property owners offering fewer commissions because of their unwillingness in some cases to commit to a permanent structure. In particular, he predicted a chilling effect on lesser-known artists whose work might be perceived as more controversial. He asserted that leasing of artwork for public spaces, rather than permanent installation, could increase.

The third witness, visual artist Rockne Krebs creates works of art with light, such as images projected on clouds. Some projects last a number of years and others are ephemeral; largely because of his chosen media, of all his works created over the past 25 years, only one remains. Nevertheless, he told the panel, he has received two corporate commissions which required a waiver. In both cases, Krebs negotiated an agreement that his work could not be removed for at least five years. Krebs asserted that artists will generally be forced to give up their moral rights in exchange for work.



## 2. The Second Panel

In his statement, Professor Edward J. Damich summarized the features of VARA. Damich proposed that the integrity right not be waivable by advance contractual agreement. Rather, he believed that the artist should be able to consent to an alteration of the work; but if the artist revokes consent before the alteration, the artist should be liable for expenses resulting from reliance on the consent. Damich supported waivability of the attribution right where the work is anonymous or a pseudonym is used, or where a work is altered with the consent of the author, such that consent to the alteration becomes a condition precedent to enforcement of waiver of the attribution right. Finally, he found the ability under VARA of one joint author to waive moral rights for all other joint authors to be inconsistent with moral rights theory and with the prohibition of transfer of moral rights.<sup>532</sup>

Through her role as a trustee of Massachusetts Volunteer Lawyers for the Arts, Deborah Benson, Esq., of Morse, Altman, Dacey & Benson, participated in the interim and final stages of the Copyright Office VARA Study. Benson noted that many artists still are unaware of VARA. A 1992 survey conducted by Massachusetts VLA revealed that 30 percent of artists were aware of VARA; a 1995 survey showed that half of surveyed artists knew of VARA. It is therefore too early to measure effects of the waiver provision, she said.

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<sup>532</sup> Damich noted that one way to address this problem is for all joint authors to sign an agreement at the outset.

Benson reviewed waiver language from contracts of the City of Seattle, Massachusetts Bay Transportation Authority, Massachusetts Highway Department, and Los Angeles County Transportation Authority, and concluded that artists' moral rights are routinely written out of their contracts. She noted that waiver language is beginning to appear in legal treatises and form books.

Richard Altman represented the artists in the first phase of the Carter case. He agreed that a distinction should be maintained between moveable art works and works incorporated into buildings, and that waiver should be retained for the latter. For moveables, however, Altman asserted that waivers should be prohibited; lesser-known artists will be asked to waive more often than established artists, and artists cannot foresee the value of what is waived.

### **3. The Third Panel**

Dale Lanzone manages the federal government's Art and Architecture Program at the General Services Administration. Lanzone described GSA art commissions, of which he said there are 63 projects in planning stages and 21 artists under contract. Although the artist generally retains copyright, the VARA provisions in section 113 relating to incorporation of art in buildings are critical to GSA commissions. VARA rights, as well as building and fire safety issues, are taken into account. Lanzone asserted that the provisions of sections 106A and 113(d) create a successful balance for all parties involved.

### **4. The Fourth Panel**

John McGreevy, Esq., of Hughes, Hubbard & Reid, represented the artists in Carter v. Helmsley-Spear, Inc.<sup>533</sup> McGreevy predicted waiver becoming standard in any contract between artist and building owner. Similarly, between building owners and tenants, he expected a standard term requiring tenants to obtain waivers of VARA rights for any artwork installed. McGreevy criticized the ability of one joint author to waive VARA rights for all joint authors. He also noted that, partly because the artists retained copyright under their contract, the work in Carter was deemed not a work-for-hire, an important determination because such works are excluded from VARA coverage.

Artist Johnny Swing, one of the Three J's in Carter, favored repeal of the waiver provision for moveables under section 106A. He recognized the need for the section 113(d) waiver provisions, but believed those provisions should be refined to specify the type of language required for an effective waiver, as does section 106A. Swing said that if the same project were offered to the Three Js today, and a waiver were presented, they would have designed the project differently, to be removable and developed on a smaller scale. Swing described and displayed photographs of the work installed in the Queens warehouse. In Swing's view, such a work had never been done before and probably never would again.

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<sup>533</sup> At the time of the hearings, the Second Circuit had not yet issued its opinion in the Carter case. The views expressed by the panel are therefore predicated on the district court opinion that afforded relief to the artists based upon VARA.

Swing believed that prohibiting waivers would have a chilling effect to the extent that work would have to be predetermined, which he found contradictory to the evolutionary nature of creating art.

Artist John J. Veronis, also one of the Three Js, compared VARA to a guardian angel that protected their work in the Carter case. He regretted that the issue pitted artists against building owners, because he recognized that parties commission art because they like it. Veronis argued that the section 106A waiver is unnecessary, because most patrons do not alter or change moveable works, and because it most affects less established artists. He supported waivability under section 113 for works incorporated into buildings. Like Swing, Veronis said that if the parties had known of VARA, the artists would have built their project differently.

Thomas Schwartz, Vice President of Helmsley-Spear, Inc., stated that, for building owners or managers, the issue of moral rights in works installed in buildings is in the same category as having a hazardous material. He believed that VARA allows a subordinate interest to obligate a superior interest, in that a tenant can obligate an owner by installing an artwork. Schwartz argued that installation of immoveable art can cause building code violations. Building owners will commission only moveable, non-site-specific work, or choose plain vanilla lobbies.

Adrian Zuckerman, Esq., of Davidoff & Malito, stressed that a tenant who commissions an installation on property without the owner's consent leaves the owner without recourse under VARA. The real estate industry is concerned that a person with a limited interest in property can give a third party a greater interest in the property. Artists should be required to obtain the

owner's consent before installing work. Zuckerman advises real estate owners, not only to obtain waivers themselves if installing art, but also to prohibit tenants from installing any artwork whatsoever.

Zuckerman asserted that, as applied in Carter, the law is unconstitutional. He noted that both the taking issue and the work for hire issue were on appeal to the U.S. Court of Appeals for the Second Circuit. Zuckerman believed VARA as applied in Carter raises a free speech issue, in that the unwitting building owner may be forced to display an artwork against his or her wishes. He stated that permanent artwork could create building code violations relating to sprinkler heads, exit signs, and fire stairs.

John Koegel, Esq., an arts attorney and former general counsel at New York's Museum of Modern Art, asserted that it is still early to measure the effects of the waiver provision, due to low awareness of VARA and to the nature of art transactions, which are largely oral and informal. Low VARA awareness limits the law's capacity to prevent misunderstandings and moral rights infringements and also means that artists may unknowingly sign waivers. On the other hand, commissioning parties who are unaware of moral rights do not request waivers of them. As in Carter, therefore, low awareness can benefit artists. Koegel was not opposed to waivability so long as waivers must be specific and in writing. After Carter, waiver requests in contracts for commissioned works will likely increase, Koegel thought, particularly with large commissions. Koegel discussed the case involving an installation by artist Judy Pfaff damaged at the Denver Art Museum, and wondered whether museums would begin to seek waivers before

borrowing such works. He said insurance companies that indemnify museums are reluctant to cover infringements of moral rights in damaged works.

Koegel did not agree that installed art would cause building code violations because artists will work cooperatively with owners, and courts will give precedence to the governmental interest of safety; that issue was reviewed by the district court in Carter, and no conflict was found. Koegel also did not believe building owners would refrain from dealing with artists, and noted that the works-incorporated-into-buildings sections are only a small part of the Visual Artists Rights Act.

## **B. THE WRITTEN COMMENTS**

Written comments were requested to be submitted by July 31, 1995. The Copyright Office received six written comments, submitted by artist John Carter; Professor Edward J. Damich, George Mason University School of Law; attorney Deborah L. Benson, Morse, Altman, Dacey & Benson; Dr. Carol Pulin, Director, American Print Alliance; National Endowment for the Arts; and Theodore Feder, Director, Artists Rights Society.<sup>534</sup>

### **1. Artist John Carter**

In the view of artist John Carter, the pertinent question is "who will bear the burden for a lack of foresight at the inception of an art commission?" Noting that a site-specific work he created with John Swing and John Veronis was saved from demolition by VARA, Carter wrote

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<sup>534</sup> Comment Letters may be found in Part VII of the Appendix, from App. at 21.

that "VARA has gone a long way towards showing that in the art world version of divorce court, the artist doesn't always lose the child."<sup>535</sup>

Carter believed the ultimate goal should be advance agreements over the future of proposed work.<sup>536</sup> but due to concern that "forced" waivers will become routine, he advocated limits on waivability of VARA rights. Non-site-specific works that can be moved without destruction should not be susceptible to waiver.<sup>537</sup> One artist should not be able to waive VARA rights for all joint authors.<sup>538</sup> Works should be protected during short-term exhibit in museums and galleries, but waiver should be permitted for dates after the exhibit to prevent an artist from forcing an institution permanently to install his or her work. Bankruptcy laws should not permit companies to negate obligations under art contracts, since monetary remedies cannot compensate for destruction of an artwork.<sup>539</sup> Where tenants commission permanent art installations as in Carter v. Helmsley-Spear, Inc., property owners should sign commission agreements unless VARA rights are waived.<sup>540</sup>

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<sup>535</sup> Carter Comment Letter; App. Part VIII, at 21.

<sup>536</sup> *Id.* at 21, 23.

<sup>537</sup> *Id.* at 22.

<sup>538</sup> *Id.* Authors of a joint work are coowners of VARA rights in that work. 17 U.S.C. § 106A(b). A waiver of VARA rights made by one such author waives those rights for all such authors. *Id.* at § 106A(e).

<sup>539</sup> Carter Comment Letter App., Part VII, at 22. "Currently our work is owned and managed by the same parties as it was at its inception. Since the names of the companies have changed, no one is bound by the agreements which were carefully drafted to protect our interests." *Id.*

<sup>540</sup> *Id.* at 22-23.

Carter suggested certain guidelines for VARA operation. A Public Commissions Office might provide a review period to permit public comment on a permanent exhibit "that somehow obstructs a public right, as in the case of Richard Serra's Tilted Arc. After review, a work might then be accorded a kind of landmark status."<sup>541</sup> A standard agreement for private commissions dealing with waiver should be developed by Volunteer Lawyers for the Arts and similar groups.<sup>542</sup>

## **2. Professor Edward J. Damich, George Mason University School of Law**

Professor Edward J. Damich limited his written remarks to two issues: whether moral rights should be waivable, and whether VARA should be amended or modified.<sup>543</sup> He expressly did not comment on incorporation of art into buildings.<sup>544</sup>

Because VARA covers a narrow range of works and limits infringement of the integrity right to intentional acts prejudicial to honor or reputation, Damich believed the integrity right should not be contractually waivable in advance.<sup>545</sup> Rather, the artist should be able to give

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<sup>541</sup> *Id.* at 23.

<sup>542</sup> *Id.*

<sup>543</sup> Damich Comment Letter; App. Part VIII, at 24.

<sup>544</sup> *Id.*

<sup>545</sup> *Id.* at 25-26.



revocable consent to a specific alteration of her work; the artist could revoke consent before the alteration, but there would be no liability once the alteration had taken place.<sup>546</sup>

Misattribution, accepted in publishing as "ghostwriting," is not widely accepted in visual arts, Damich noted.<sup>547</sup> He supported waivability under VARA of the right to claim authorship where the artist consents to an alteration,<sup>548</sup> or where the work is anonymous or a pseudonym is used, because gallery owners might market works of artists they are only willing to handle anonymously, such as convicts.<sup>549</sup>

Damich opposed the provision allowing one joint author to waive rights for all other joint authors.<sup>550</sup> He asserted that consent of every joint author should be required to waive the integrity right and that waivers should be from each joint author whose attribution would be affected to waive the attribution right.<sup>551</sup>

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<sup>546</sup> *Id.* at 26. The artist would pay for expenses incurred in reliance on the artist's consent, if revoked. *Id.*

<sup>547</sup> *Id.* at 28-29.

<sup>548</sup> "The artist may bind herself in advance to continue to be identified as author of the altered work, although she can prevent the alterations from occurring by revoking her consent up to the moment before they occur. Thus, consent to the alteration becomes a condition precedent to the enforcement of the waiver of the right of attribution." *Id.* at 29.

<sup>549</sup> *Id.* at 29.

<sup>550</sup> *Id.* Damich found this inconsistent, not only with the theory of moral rights, but also with VARA's prohibition of transfer of such rights. *Id.*

<sup>551</sup> *Id.* at 30.

### 3. Deborah L. Benson, Esq., Boston's Morse, Altman, Dacey & Benson

Attorney Deborah Benson observed that the arts community remains largely unaware of VARA.<sup>552</sup> Benson believed that it is still too early to document the effect of the waiver provisions.<sup>553</sup>

In Benson's experience, the VARA waiver provisions negate the statute's protections due to disparate bargaining power of artists, limited opportunities for commissions, and buyers' desire to draft contract language "which is consistent with the law and no greater."<sup>554</sup> Because the Carter case has established a low threshold for qualifying a work as one of recognized stature, Benson predicted that removal of most installed works would violate the artist's right of integrity, and that parties who commission art for installation will want to reserve the right to remove such works, even if removal results in destruction.<sup>555</sup> She looked to pre-VARA contracts (including some that addressed state moral rights laws) as evidence of the tendency of commissioning parties to obtain "insurance provisions in commission contracts" to "enable them

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<sup>552</sup> This observation was based on two surveys conducted by the Massachusetts VLA. In the first, conducted in 1992, about 70 percent of 22 well-established artists surveyed were unaware of VARA. *Id.* In the second survey, in 1995, about 50 percent of those surveyed were still unaware of VARA. *Id.* The second survey consisted of 58 persons (39 artists and 19 attorneys). Letter from Deborah Benson, Esq., to Marilyn J. Kretsinger, Acting General Counsel, U.S. Copyright Office (April 25, 1995).

<sup>553</sup> Benson Comment Letter; App. Part VII, at 35.

<sup>554</sup> Benson Comment Letter at 34.

<sup>555</sup> *Id.* at 36.

to avoid violating the law."<sup>556</sup> She discussed contract language that could operate to waive moral rights in contracts of the Municipality of Metropolitan Seattle, the Massachusetts Bay Transportation Authority, the Massachusetts Highway Department Temporary Construction Arts Project, and the Los Angeles County Metropolitan Transportation Authority.<sup>557</sup>

Artists who receive commissions usually create a work specifically for the space in which it will be installed. Benson wrote: yet contracts usually vest all rights with regard to removal of the work with the commissioning party, and there is generally no negotiation over the language.<sup>558</sup> In fact, Benson wrote, artists' moral rights are routinely written out of their contracts. To prevent wholesale waiver of rights, she recommended tightening protections and narrowing (if not repealing) the waiver provision, but conceded that such modification could have a chilling effect on commission of art.<sup>559</sup>

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<sup>556</sup> *Id.* at 35.

<sup>557</sup> *Id.* at 36-37. These art contracts, and Benson's comments on them, are discussed *infra*, Ch. VII, notes 609-21 and accompanying text.

<sup>558</sup> *Id.* at 37-38.

<sup>559</sup> *Id.* at 39-40.

4. **Dr. Carol Pulin, Director, American Print Alliance**

Dr. Carol Pulin presented testimony on behalf of the American Print Alliance.<sup>560</sup> Pulin observed that prints have always been vulnerable to copying,<sup>561</sup> but copyright infringement now often entails VARA rights violations as well, because the borrower can so easily modify the image before reprinting it.<sup>562</sup> Where artists have granted copyright permission for a reproduction, they often are surprised to find their images modified even if they were not asked to waive their VARA rights of attribution and integrity.<sup>563</sup> Violations may include overprinting, cropping, printing a catalogue title across an image reproduced on a cover, or using a detail rather than an entire image.<sup>564</sup> Most artists do not understand their moral rights, Pulin wrote.<sup>565</sup> Those that do still do not prosecute, for both economic reasons and fear of retaliation.<sup>566</sup>

Pulin suggested increasing educational efforts, including short articles and information sheets for distribution to art magazines, art schools, design newsletters, and inclusion with

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<sup>560</sup> The American Print Alliance is a non-profit consortium of U.S. and Canadian printmakers' councils representing about 3,000 artists. Pulin Comment Letter; App. Part VIII, at 41.

<sup>561</sup> Id. at 41-42.

<sup>562</sup> Id. at 46.

<sup>563</sup> Id. at 42-43.

<sup>564</sup> Id. at 43.

<sup>565</sup> Id.

<sup>566</sup> Id. at 43-44.

computer software used to modify pre-existing images.<sup>567</sup> She advocated use of a notice to indicate which VARA rights have been waived so that, if such rights have not been waived, the public will be able to discern an illegitimate modification of an artist's image.<sup>568</sup>

##### **5. National Endowment for the Arts**

The National Endowment for the Arts advocated strengthening VARA rights in three ways.<sup>569</sup> First, because artists must be aware of their rights before they can intelligently waive them, NEA urged the Copyright Office to conduct an education campaign to inform artists, purchasers and the general public of VARA rights.<sup>570</sup>

Second, NEA proposed revising the waiver provision to add five additional requirements: (1) a specific description of rights proposed for waiver;<sup>571</sup> (2) at least 90 days notice to the artist of any proposed modification, removal, or destruction of a work parallel to the VARA section 113(d) provisions for works incorporated in buildings; (3) a reasonable opportunity for the artists to preserve any work slated for destruction; (4) specific additional compensation for

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<sup>567</sup> Id. at 45.

<sup>568</sup> Id.

<sup>569</sup> National Endowment for the Arts Comment Letter; App. Part VIII at 48.

<sup>570</sup> Id. at 49.

<sup>571</sup> NEA Comment Letter at 50.

Thus, for example, the contract should not provide simply "Artist waives all rights under the Visual Artists Rights Act." The preferred alternative would be: "Artist waives her/his rights under the Visual Artists Rights Act, including the legal rights to claim or disclaim authorship of the work and the right to prevent distortion, mutilation or other modification of the work."

inclusion of a waiver in a contract and for exercise of the waiver in the event of actual modification, removal or destruction; and (5) in the case of a joint work, consent by all joint authors for a waiver.<sup>572</sup>

Third, NEA proposed expanding moral rights under VARA in four ways: (1) the law should include all visual arts media and eliminate the numerical limitation on editions;<sup>573</sup> (2) moral rights should subsist for a term equivalent to copyright rather than expire upon the artist's death;<sup>574</sup> (3) the integrity right should include the right to complete a work, contrary to the district court ruling in Carter v. Helmsley-Spear, Inc.;<sup>575</sup> and (4) the Copyright Office should examine experience under state moral rights laws, and recommend that the Federal government should use such state programs as a model for greater protection of artists than exists under VARA.

6. **Dr. Theodore H. Feder, Director, Artists Rights Society**

Although passage of VARA was "a step in the right direction," Artist Rights Society (ARS) believed the law falls far short of norms envisioned by the Berne Convention. In ARS' view, the three "most glaring failures" of VARA are: (1) VARA rights endure only for life of

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<sup>572</sup> Id. at 50.

<sup>573</sup> Id. (citing restriction in definition of "work of visual art" to limited editions of 200 copies or fewer).

<sup>574</sup> Id. at 51.

<sup>575</sup> NEA observed that an artist has the absolute right to decide when and whether a work is complete and when and whether to show it to the public. Id. (citing JOHN MERRYMAN & ALBERT ELSEN, LAW, ETHICS AND THE VISUAL ARTS).

the author and are not descendible;<sup>576</sup> (2) the rights apply only to works created on or after VARA's effective date, and to works created before that date that were never conveyed by the artist to another party; and (3) VARA "does not cover printed or broadcast reproductions of the works, thus excluding distortions which may appear in magazines, books, or television."<sup>577</sup>

### C. ISSUES RAISED IN OFFICE PROCEEDINGS

Those responding to the Copyright Office Request for Comments through oral and written testimony were by no means unanimous in their views, but a few recurring issues were addressed.

#### 1. Low Level of VARA Awareness

Some respondents, including attorneys Deborah Benson and John Koegel, asserted that the effects of VARA's waiver provisions cannot yet be measured because of the low level of VARA awareness among artists and others. Benson stated her survey showed that at least one half of visual artists were unaware of VARA. American Print Alliance's Carol Pulin and the NEA both called for increased VARA education by the Copyright Office, arts groups, art magazines and newspapers; but others, such as attorney Koegel, thought VARA awareness would come with time, publicized litigation and word of mouth.

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<sup>576</sup> Artists Rights Society Comment Letter; App. Part VIII, at 53. ARS stated that this limitation contradicts Berne art. 6bis(2), "which requires the rights of integrity and attribution to be maintained at least until the expiry of economic rights." ARS noted, however, that any preempted state moral rights protection would again be effective after the artist's death and expiration of VARA rights.

<sup>577</sup> *Id.*

## **2. Waiver for Moveable Artworks**

The distinction between moveable art works, such as paintings and sculpture, and works incorporated into buildings as discussed in section 113, was highlighted at the VARA hearing.

As noted by Art Dealers Association's Gelbert Edelson, VARA waivers are rarely employed for moveable art works because written contracts are rare for art transactions covering these works. Waivers for moveables were not favored by art dealers or art lawyers. For moveables, the majority of works of visual art addressed in section 106A, several witnesses asserted that the ability of artists to waive their moral rights should be repealed or modified. Artists John Carter, John Veronis and Johnny Swing, and attorney Richard Altman favored repeal of waiver at least for moveables, especially if the works were not site specific. Benson focused her testimony primarily on installed works and section 113, but she maintained that in general, waiver provisions effectively negate the protections of the Visual Artists Rights Act. Edelson similarly saw waivers for moveables in general as "highly suspicious," not favored and ill-advised. Professor Edward J. Damich, who addressed only section 106A, stated that the integrity right should not be capable of being waived by advance contract, but only where an artist gives revocable consent to a specific alteration. He asserted that the attribution right should be able to be waived under some circumstances. The National Endowment for the Arts proposed revising section 106A's waiver provision with additional requirements, such as a 90-day waiting period before modification or destruction of a work, "parallel to" the section 113



requirements. John Koegel was not opposed to waiver so long as it must be specific and in writing to be effective.

### **3. Waiver for Works Incorporated Into Buildings**

Nearly all participants expected waivers to increase for works incorporated into buildings following the decision of the U.S. District Court in Carter v. Helmsley-Spear, Inc. Of this opinion were Edelson, Benson and Koegel, as well as attorney John J. McGreevy, artist Rockne Krebs, and Helmsley-Spear Vice-President Thomas Schwartz. In fact, many participants predicted that waivers would become standard in any contract between an artist and a building owner.

Most panelists affirmed the need for waiver of moral rights for works incorporated into buildings. General Services Administration's Dale Lanzone, who believed that VARA successfully balances the interests of all parties, called section 113 "critical" to GSA commissions. Attorney Altman saw the need for waiver for installed works. Artists Veronis and Swing would both preserve waiver for section 113, although Swing would refine it to specify the type of language required for effective waiver. Professor Damich expressly did not address section 113. Attorney Benson stood somewhat alone in urging modification of section 113. She would advise a real estate client to obtain a waiver; but for her, the fact that most contracts for major commissions will routinely include waivers means that the section 113 waiver provision should be tightened and narrowed, if not repealed.

Many panelists believed that repeal of section 113 waiver would result in a chilling effect on creation of art. ADA's Edelson cautioned that, without waiver, real estate owners and developers may be unwilling to commit themselves to a permanent structure. Artist Johnny Swing agreed. Although arts attorney Koegel was skeptical, Helmsley-Spear's Schwarz and attorney Adrian Zuckerman suggested that, without waiver, "plain vanilla lobbies" would be the rule. Even Benson, who advocated narrowing or repealing the section 113 waiver provisions, conceded that such modification could have a chilling effect on art commissions.

Notably, there may be a chilling effect on art even if building owners have obtained a waiver from artists. In other words, now that moral rights have been legislated, there may be a chilling effect whether or not waivers are permitted. Artist Swing reported that, had the parties known of VARA and agreed to a waiver, the Three J's would have undertaken the project, but designed it differently and developed it on a smaller scale; Artist Veronis agreed.<sup>578</sup> Swing, who believed that predetermining a work is contrary to the evolutionary nature of creating art, said that there will probably never be another work like the one they created. Now that VARA exists, ADA's Edelson predicted that leasing of art for public spaces, rather than permanent installation, might increase. Benson, too, thought that, even if there is no initial intention to destroy a work, lawyers will push for waiver for works in buildings, so there may always be a chilling effect on making the work. Finally, the law may most inhibit

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<sup>578</sup> On the other hand, one could argue that, before VARA, there was the chilling effect of knowing that there was little to prevent destruction or modification of one's art work.

the work of young, lesser-known, or avant-garde artists, who attorney Altman notes will be asked to waive more often than established artists.

#### **4. Other VARA Issues for Works Incorporated Into Buildings**

Other arguments were made with respect to works incorporated into buildings. The constitutional "taking" question and related problems were raised by Schwartz and Zuckerman. They thought VARA also raised conflicts with building and fire code compliance. Attorney Koegel disagreed, citing the district court opinion in Carter. Where a tenant commissions a work, Schwartz and Zuckerman believed the artist should have to get permission of the building owner. Artist Carter agreed, unless VARA rights are waived; but others, including Koegel, thought this an unrealistic burden for artists. Schwartz and Zuckerman, as well as attorney McGreevy, predicted a standard term in leases between tenant and building owner requiring tenants to either get waivers or refrain from installing art.

#### **5. Waiver for Commissioned Works**

The discussion at the hearing also distinguished moveables from major commissioned works in general. If the comments of Edelson, Benson and General Services Administration's Dale Lanzone are illustrative, major commissioned works include large, installed pieces such as Richard Serra's "Tilted Arc" as well as large, government-commissioned works. The comments predicted standard waivers in commissions for installed pieces whether or not they are incorporated into buildings. Because section 113 deals only with works incorporated into buildings, and all other VARA works of visual art are addressed in section 106A, if waiver is

desirable for installed works and ill-advised for moveables, the statute may need to be clarified to retain waiver for commissioned works if section 106A waiver is repealed. A related issue is whether removal of a site-specific work, even without damage, would infringe rights of integrity or attribution.

**6. Joint Author's Ability to Waive Other Joint Authors' Moral Rights**

Several parties, including Damich, Attorney McGreevy, Carter, and National Endowment for the Arts, argued that one joint author should not be able to waive moral rights under VARA for all joint authors. Professor Damich argued that consent of every joint author should be required to waive the integrity right, and that waiver of the attribution right should necessitate the consent of every joint author whose attribution would be affected.

**7. Scope of VARA Protection**

American Print Alliance's Carol Pulin and Artist Rights Society's Theodore H. Feder believed that VARA should apply to print or broadcast reproductions of works, thus covering distortions in magazines, books, and electronic media. Feder also advocated expanding the integrity right to include the right to complete a work. The National Endowment for the Arts advocated expansion of VARA to include all visual media. On the other hand, representatives of copyright industries opposed broadening the scope of moral rights on grounds that to do so would restrict dissemination of copyrighted works and threaten business practices.

## 8. Work-for-Hire

The work-for-hire doctrine was also discussed. Those witnesses involved in the Carter case debated whether the work in Carter should be deemed one for hire but, as several parties noted, one aspect of the Carter opinion dealing with work for hire has even broader implications. Normally, the work-for-hire question is decided in order to determine copyright ownership, that is, whether the employer or the artist is considered to be the "author" for copyright purposes. In a VARA infringement case, the work-for-hire question is decided to determine whether the work is even covered by VARA as a "work of visual art" under section 101.<sup>579</sup>

## 9. Other Concerns

The NEA and Artists Rights Society's Feder believed the term of VARA moral rights should endure beyond life of the author to be coextensive with economic rights. Pulin suggested a formal notice of waiver, similar to copyright notice. Koegel noted the reluctance of insurance companies to indemnify property owners or artists for damages related to VARA infringements. Finally, Pulin observed that artists are reluctant to prosecute VARA rights, for fear of retaliation.

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<sup>579</sup> Works-for-hire are excluded from the definition of a "work of visual art" and are not covered by VARA. 17 U.S.C. § 101 (definitions).

## VII. WAIVER PROVISIONS IN ARTISTS' CONTRACTS

This chapter examines the principal parties involved in negotiating art contracts to learn who most frequently initiates waivers and reviews examples of waiver of moral rights language from art contracts and sample agreements to determine how broadly waivers are drawn and whether the specific works and uses are identified as required by VARA.

### A. OVERVIEW OF ART CONTRACTS

The terms "gallery," "dealer," and "agent" are often used interchangeably in art contracts, but general definitions of each seem to hold true. A gallery is usually the physical location where art is sold. Galleries obtain art in many ways. The gallery may accept art on consignment from the artist, then sell it and retain a percentage (usually 30-60 percent) of the sales price. Galleries may purchase works from artists and sell them at a markup, avoiding the consignment/commission process. Galleries may purchase art in the "secondary market" from other galleries, dealers and individuals. The artist/gallery relationship may be exclusive or non-exclusive (allowing the artist to consign art to other galleries, sell art directly, or work with private dealers and agents).<sup>580</sup>

In its function as exclusive artist representative, a gallery is most likely to be involved in the waiver of moral rights or the negotiation of copyrights, according to Robert Panzer,

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<sup>580</sup> Letter from Robert Panzer, Director of the Visual Artists and Galleries Association, Inc. (VAGA), to Jennifer Hall, Attorney-Advisor, U.S. Copyright Office (November 29, 1994), at 1. Galleries are sometimes referred to as "dealers." *Id.*

executive director of the Visual Artists and Galleries Association (VAGA). Where the gallery sells a work of art to an individual, business, museum or other gallery, it is possible that a purchaser could insist that the sale include a written contract in which moral rights are waived. Mr. Panzer believes this request is most likely to come from a museum, followed by a business, a gallery, and then an individual. The clause would probably appear as part of a bill of sale.<sup>581</sup>

"In my view," writes Panzer, "moral rights waivers will more than likely be initiated by the purchaser. The artist is least likely to know about such a waiver when the artist allows the gallery, dealer or agent to control all aspects of a sale. A good gallery or dealer will notify the artist when a purchaser asks for a waiver."<sup>582</sup>

Dealers, if not synonymous with a gallery, are sometimes called private dealers. The private dealer functions as a broker, bringing together buyers and sellers, often for a commission or the markup on a sales price. Many dealers who own galleries also sell art in this fashion, without displaying the art in a formal manner.<sup>583</sup>

An agent is similar to a dealer who has arranged with an artist to help sell the artist's work. The agent does not have a gallery space, but as with a gallery, a personal relationship may develop in which the agent guides the artist's career. An agent's commission may be less

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<sup>581</sup> *Id.* at 2.

<sup>582</sup> *Id.*

<sup>583</sup> *Id.*

than a gallery's commission because the agent has little overhead from rent, employees, and promotional and advertising costs.<sup>584</sup>

The phrase "artist's representative" is sometimes used to denote the representative of a commercial artist. Photographers may be represented by an individual or a stock agency.<sup>585</sup>

Agreements between an artist and a dealer are more often oral than written.<sup>586</sup> One of the purposes of the artist gallery relationship is to make the artist visible and establish his or her credibility in the art community; it is therefore intense and emotional, because the dealer is selling an aspect of the artist's persona.<sup>587</sup> Arts attorney Madeleine E. Seltzer recommends that such agreements should at least cover the following issues: gallery commission, term of agreement, terms of payment and record keeping, exclusivity, control over exhibition style, expenses, retail prices, and copyright.<sup>588</sup>

## **B. SAMPLE CONTRACTS**

The following excerpts are examples of moral rights waivers from sample art contracts.

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<sup>584</sup> *Id.*

<sup>585</sup> Madeleine E. Seltzer, How to Have a Meaningful Relationship With Your Professional: Choosing a Rep., a Gallery, an Accountant, a Lawyer, in *THE VISUAL ARTISTS MANUAL*, 6-7 (Susan A. Grode, ed., 1984).

<sup>586</sup> *Id.* at 4.

<sup>587</sup> *Id.* at 3.

<sup>588</sup> *Id.* at 4-6.



## 1. Nimmer On Copyright

The Nimmer copyright treatise offers contract language that can be used in a commission agreement or bill of sale if the visual artist is willing to waive moral rights. Nimmer notes that VARA requires the use of the work to be identified in the waiver<sup>589</sup> but writes, "[i]t is assumed for present purposes that the primary use is as a work of visual art; the statute does not require that every use be described in the waiver."<sup>590</sup>

In Nimmer's sample waiver, Form 28-5 Artist's Waiver Under 17 U.S.C. §106A, the artist acknowledges the existence of his or her statutory moral rights as described in 17 U.S.C. §106A(a) and "knowingly executes" the waiver. The agreement specifies by title the works to which the waiver applies, and states that the waiver applies to "any and all applications in which either the attribution right or the integrity right may be implicated."<sup>591</sup>

Then, with respect to the named works and "for uses enumerated in subparagraph (b) above," the artist:

hereby expressly and forever waives any and all rights arising under 17 U.S.C. §106A, and any rights arising under U.S. federal or state law or under the laws of any other country that conveys rights of the same nature as those conveyed under

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<sup>589</sup> See 17 U.S.C. § 106A (e)(1) ("Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified.").

<sup>590</sup> 6 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 28.06 (Form 28-5).

<sup>591</sup> *Id.*

17 U.S.C. §106A, or any other type of moral right or droit moral.<sup>592</sup>

The agreement is signed and dated by the artist.

## 2. Publishing Law Handbook

One example of a broad, general waiver can be found in the model contract in Appendix 4 of Prentice Hall Law & Business The Publishing Law Handbook.<sup>593</sup> In the "Publishing Work For Hire Agreement," the artist specifically waives any and all "artist's rights" he or she may have "pursuant to any state or federal statutes regarding the material purchased by the Publisher and described herein." The artist authorizes the publisher to identify and credit the artist and to use or authorize use of the artist's name and pertinent biographical data in connection with advertising or promotion of the material's publication.

## 3. Campbell's Soup Art Contest

Perhaps inspired by Andy Warhol's take on the classic American soup can, Campbell's Soup Company in 1994 initiated its "Campbell's Art of Soup Contest."

Under the language in the contest advertisement, by entering the contest each entrant forfeits all rights to the content of their entry and artwork and the concepts embodied therein. All artwork or entries submitted belong exclusively to Campbell's, and the entrant unconditionally assigns and transfers to Campbell's all right, title, interest and claim in the

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<sup>592</sup> Id.

<sup>593</sup> E. GABRIEL PERLE & JOHN TAYLOR WILLIAMS, PRENTICE HALL LAW & BUSINESS PUBLISHING LAW HANDBOOK, A-22 (2d ed. 1992).

artwork or entries. Campbell's has the right to use, assign or dispose of the artworks "however it sees fit without approval of entrants or any third parties" and the entrant will "have no rights to bring (and covenants not to bring) any claim, action or proceeding against" Campbell's. Further, the contest rules provide, "Entrants have no right of review or approval of how their artwork or entries will be used by the sponsor and shall not receive any compensation or credit for the use of their artwork or entries."<sup>594</sup>

The contest entry form contains a moral rights waiver for the artist to sign and date. The artist specifies the type of artwork being entered (e.g., painting, drawing, sculpture, etc.) and agrees, "I assign any copyright in my entry to Campbell and waive any rights of attribution. If I am submitting this entry on behalf of my minor child, I make these representations on behalf of my child and myself."<sup>595</sup>

**4. 1986 Arts Commission Contract with the Municipality of Metropolitan Seattle for the Downtown Seattle Transit Project**

In a 1986 Arts Commission Contract with the Municipality of Metropolitan Seattle for the Downtown Seattle Transit Project,<sup>596</sup> the Seattle metro system agrees not to damage, alter, modify, change or substantially relocate the artwork without first conferring with the artist and

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<sup>594</sup> Campbell's Soup Company, Advertisement, "Campbell's 1994 Art of Soup Contest" (1994). See Joshua J. Kaufman, Esq., Press Release (Nov. 1994).

<sup>595</sup> *Id.*

<sup>596</sup> Contract No. CT/F8-86, Agreement for Artist Services for the Downtown Seattle Transit Project Art Program Between the Municipality of Metropolitan Seattle and [Artist].

obtaining the artist's prior written approval. The contract goes on to provide, however, that notwithstanding an artist's refusal to provide (or Metro's failure to obtain) such approval, the Metro Council may remove the work, if a designated arts committee so recommends. The artist has a right of first refusal to purchase the work, if the work stands alone and is not integrated into a larger piece and can be removed without expense to Metro; the artist also has the right to have his or her name removed from the art and installed plaque.<sup>597</sup>

"This type of language in a commission agreement today would operate as a waiver," writes attorney Deborah Benson of Boston's Morse, Altman, Dacey & Benson. "Nothing in this contract prevents the removal of the work by the commissioning party, even if removal results in the alteration, modification or even the complete destruction of the artwork."<sup>598</sup>

#### **5. Massachusetts Bay Transportation Authority "Arts-on-the-Line" Program**

Contracts between artists and the Massachusetts Bay Transportation Authority for its "Arts-on-the-Line" program<sup>599</sup> give the MBTA the right to remove the artwork from display; if the work cannot be moved without mutilation or destruction, then the artist has the right to remove such elements of the work as may be salvaged without damage to the property.

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<sup>597</sup> Id. § 9B (1)-(3).

<sup>598</sup> Benson Comment Letter; App. Part VIII, at 36-37.

<sup>599</sup> Attorney Benson writes that the Massachusetts system's program "helped set national standards for incorporating art into mass transit facilities." Id. at 37.

Most of the Arts-on-the-Line contracts are pre-VARA and track the language of the Massachusetts Art Preservation Act: that act provides that moral rights in a work of fine art that cannot be removed from a building without substantial defacement, mutilation, alteration or destruction of the work are "automatically waived" unless expressly reserved in a recorded instrument.<sup>600</sup> A sample MBTA contract from April 1991 contains the following language:

...The MBTA agrees that it will not intentionally destroy, damage, alter, modify, or change the work in any way. If an alteration should occur, then the work shall no longer be represented as the work of the Artist without written permission. MBTA agrees to reasonably assure that the work will be properly maintained and protected. This does not preclude MBTA's right to move the work of art or to remove it from display, provided that if any part of the artwork is moved from the site without the consent of the Artist, then it will no longer be represented as the Artist's work. If the work cannot be moved without mutilation or destruction, the Artist has the right to remove such elements of the artwork as may be salvaged without damage to the property.<sup>601</sup>

## 6. Massachusetts Highway Department Temporary Construction Arts Project

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<sup>600</sup> *Id.* In attorney Benson's experience, artists who receive public commissions usually attest that their piece is created specifically for the space in which it will be installed and that removal usually results in destruction of the work as it was designed to appear. Yet government commissions usually do not afford an opportunity for the artist and commissioning party to discuss the work's removal if, for example, the building is "torn down, if the public dislikes the work, or if the work is unsafe or creates a public hazard or nuisance." *Id.*

<sup>601</sup> MBTA Contract with Artist for Fabrication and Supervision of Installation § 23.C at 7 (April 3, 1991).

The objective of the Artery Arts Program's Temporary Construction Arts Project<sup>602</sup> is to bring visual interest to the construction barrier surrounding the demolition of an A&P Building in South Boston.<sup>603</sup> Under the agreement, the contractor designs and creates images to be transferred to up to 50 panels, transfers the images to the panels and supervises their mounting, among other duties.<sup>604</sup> In attorney Benson's view, because the panels are "removable" and "temporary," the Highway Department is entitled under the contract to "destroy" the artwork.<sup>605</sup>

#### **7. Los Angeles County Metropolitan Transportation Authority Contract**

A 1994 commission agreement with the Los Angeles County Metropolitan Transportation Authority permits removal of the artwork at the sole discretion of the Transportation Authority, even when such removal may subject the work to physical defacement or other modification.

Massachusetts Arts Attorney Deborah Benson sees this as "the most sweeping waiver language," because the artist waives all rights under the California Preservation Act and VARA. "While this language may not meet the technical requirements of VARA, because it is arguably

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<sup>602</sup> Massachusetts Highway Department, Central Artery (I-93)/Tunnel (I-90) Project, Technical Services Contract No. 94165-T-281, R01C1 Temporary Construction Arts Project (June 13, 1994), Issued by Bechtel/Parsons Brinckerhoff (B/PB), Management Consultant to the Massachusetts Highway Department.

<sup>603</sup> *Id.* at Exhibit D, "Scope of Services," § 1.0.

<sup>604</sup> *Id.* § 2.0.

<sup>605</sup> Benson Comment Letter; App. Part VIII, at 38.

overbroad. it clearly documents the commissioning parties intent to require the artist to give up his or her moral rights and to insure against a claim for violation of these rights."<sup>606</sup>

The Los Angeles contract language is as follows:

The parties agree that subsequent to installation of the Artwork, USG or the AUTHORITY may, at its sole discretion, remove the Artwork from the Project or move the Artwork to any location at any time even though such removal or movement may subject the Artwork to physical defacement, mutilation, alteration, distortion, or destruction or other modification. The Artist specifically agrees to waive as against USG and the AUTHORITY, and any and all of their respective successors in interest, any rights which the Artist may have under California Civil Code Section 987, et seq., or under Federal Code sections 17 USC 106A and 17 USC 113 and agrees that under no circumstances will title to the Artwork revert to the Artist, his heirs, legatees, assignees or personal representative.<sup>607</sup>

**8. General Services Administration Public Buildings Service Contract for Artist's Services**

Under the standard GSA contract, the artist determines the public building art project's artistic expression and design "subject to its acceptability to the Government," performs services, and furnishes all supplies, materials and equipment.<sup>608</sup> The contract contains the following waiver or modification of VARA rights:

[F]or purposes of section 603 of the Visual Artists Rights Act of 1990, 17 U.S.A. 106A, the Government and the Artist will

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<sup>606</sup> Id.

<sup>607</sup> Contract, Los Angeles County Metropolitan Transportation Authority, Art. IX(B) at 12 (1994).

<sup>608</sup> General Services Administration Public Buildings Service Contract for Artist's Services § B.1.1.

mutually agree upon a definition of the work of art which will include the significant characteristics salient to its meaning. Only the significant characteristics so agreed upon will be subject to the protection of section 603 against any intentional distortion, mutilation, or other modification of the work, or against any intentional or grossly negligent destruction of the work. The Artist agrees to waiver of protection to all other aspects and uses of the work pursuant to section 603(e).<sup>609</sup>

Copyright in the work belongs to the artist, but the work becomes "sole property of the United States Government subject to the provisions of the Visual Artists Rights Act of 1990."<sup>610</sup> The Government is responsible for maintenance and preservation of the work,<sup>611</sup> but has the right to make alterations to the building, grounds, approaches and appurtenances, again subject to the contract's moral rights provisions.<sup>612</sup>

#### **9. Philadelphia Convention Center Installation**

Arts attorney John Koegel submitted the following contract language from his client's contract for an art installation in the Philadelphia Convention Center. The contract provides:

##### **7.2 Consent and Waiver**

The Artist consents to the installation of the Work in the Convention Center and the Artist and the Authority acknowledge that installation of the Work may subject the Work to destruction, distortion, mutilation or other modification by

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<sup>609</sup> *Id.* § B.1.4.

<sup>610</sup> *Id.* § G.1.1.

<sup>611</sup> *Id.* § B.1.6.

<sup>612</sup> *Id.* § G.1.2.



reason of its removal and that pursuant to Section 113 (d)(i) of Title 17 of the United States Code, the rights conferred on the Artist by paragraphs (2) and (3) of Section 106(A)(a) of said Title shall not apply and are hereby waived by the Artist. Authority agrees to make every effort not to damage, destroy, distort, mutilate or in any way modify the Work in the process of such removal.<sup>613</sup>

#### **10. Moral Rights Waiver Letter Agreement**

One artist submitted a May 9, 1995, letter agreement to waive VARA rights. The letter was physically attached to a photocopy of the statute itself and stated the following:

Dear \_\_\_\_\_:

This confirms that I have read the attached act.  
I agree to waive all of my rights under this law known as the Visual Artists Rights Act ("VARA").  
This applies to all work commenced since December, 1994 and in the future for several buildings, including one known as ... \_\_\_\_\_, Manhattan; and a second building known as \_\_\_\_\_ ...in Long Island City, Queens.

Sincerely,

\_\_\_\_\_  
Manhattan Avenue,  
New York \_\_\_\_\_<sup>614</sup>

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<sup>613</sup> Contract for Installation in Philadelphia Convention Center for Artist Judy Pfaff § 7.2 (January 3, 1994) (submitted by attorney John Koegel).

<sup>614</sup> Submitted to the Office at public hearing (June 21, 1995).

## **11. Krebs Agreements for Public Art**

Artist Rockne Krebs submitted the copyright provisions of three contracts for public art installations that required a waiver of moral rights and VARA.<sup>615</sup> In two of the contracts, Krebs retained copyright but limited the commissioning parties' "preservation responsibilities" to five years. In the third, he and the owners each received 50 percent ownership of the copyright.<sup>616</sup>

The first contract is "designed to maintain the artistic integrity and authenticity of the Art" and requires the commissioning party to "protect and maintain the Work against the ravages of time, vandalism and the elements for a minimum period of five years." The contract states that its obligations:

supersede those defined by the California Art Preservation Act, and the federal Visual Artists Rights Act of 1990 in terms of the longevity of the art. Janss\TYS and the Artist agree to a five year minimum period of operation for the art. After the minimum period if Janss\TYS has questions about the value to themselves of continued operation of the art, these questions will be reviewed with the Artists.<sup>617</sup>

In the second contract, the artist agrees to waive certain rights under the California moral rights statute and "any rights which Artist may have...under the Visual Artists' Rights Act of

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<sup>615</sup> Letter from Rockne Krebs, Artist, to Marilyn Kretsinger, Acting General Counsel, U.S. Copyright Office (June 21, 1995).

<sup>616</sup> *Id.*

<sup>617</sup> *Id.* at 2.

1990,"<sup>618</sup> but the parties "agree that physical alteration or destruction or the nonoperation of the Artwork may be detrimental to Artist's reputation." In lieu of the state or federal moral rights statutes, the parties agree that in the event the owner proposes "major alteration or destruction of the work" or its removal the owner will provide the artist with at least 30 days' prior written notice.<sup>619</sup>

In the third Krebs contract, the artist transfers 50 percent of the copyright to the owner and agrees to the following waiver:

Artist acknowledges that the Artwork is being installed in and around various fountains and that the tiles comprising the Artwork may be subject to destruction, distortion, mutilation or other modification if Owner finds it necessary or desirable to remove, relocate, alter or modify the fountains or to remove the Artwork from the fountains. In addition, both parties agree that subsequent to installation of the Artwork Owner may, at its sole discretion, move the Artwork to any location at any time and may restrict or modify public access in any way, even though such movement may subject the Artwork to greater risk of physical defacement, mutilation, alteration or destruction. Artist therefore specifically agrees to waive as against Owner, and any and all of its respective successors in interest, any rights which Artist may have under California Civil Code Section 987, et seq. and under the Visual Artists' Rights Act of 1990."<sup>620</sup>

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<sup>618</sup> Id. at 5.

<sup>619</sup> Id.

<sup>620</sup> Id. at 8-9.

## **12. Helmsley-Spear Tenant Agreement**

Finally, pursuant to its experience with the Three Js in its Queens warehouse, Helmsley-Spear, Inc., submitted sample language for a new provision to be included in lease agreements with potential tenants. The company's standard lease will now include language such as or similar to the following:

**Visual Artists' Rights Act.** Tenant agrees that it will not install any work of art subject to the Visual Artists' Rights Act of 1990 (17 U.S.C. 101 et seq.) without first obtaining a waiver, satisfactory to the Landlord, from the artist of his or her rights under such Act. Tenant shall have no right to install art on the Premises without first obtaining such waiver and any work of art installed without such waiver shall be deemed a trespass, removable by the Landlord upon one day's notice.<sup>621</sup>

Because the majority of art transactions are achieved by oral agreements, most individual artists have little experience with VARA waivers. Waivers contracts are employed most often for commissioned works and for the purchase of major works of fine art. Artists representatives and purchasers are most likely to be involved in negotiating waivers. According to one respondent, among purchasers, museums are most likely to request waivers, followed by businesses, galleries and individuals.

Waiver contracts listed in legal forms books identify the work by title and suggest broad waivers of the attribution and integrity right, with Nimmer's form providing for waiver of

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<sup>621</sup> Sample Lease Agreement.

VARA rights, as well as rights afforded by U.S. federal or state law and moral rights granted by the laws of any other country.

Of the contracts submitted as examples, one provides for unconditional transfer of all rights to the company. Most preserve the artist's integrity rights, but give the purchaser the right to remove the work, sometimes giving the artist first rights to purchase or remove the work when removal might damage it. Purchasers in these latter contracts were municipalities, states, or the federal government.

Sample agreements submitted by two individual artists varied greatly in the specificity of their terms. The first identified the works by the names of the buildings for which they were created, and simply waived all VARA rights for works commenced since December 1994 for those buildings.

Two other agreements, submitted by a well-known artist, obligated the commissioning party to certain preservation responsibilities for a five-year period. The second waives state and federal moral rights but provides for notification to the artist before any major alteration or destruction of the work and before its removal. The third agreement involving this artist similarly waives state and federal moral rights laws and gives the purchaser express rights to relocate or remove the artwork and to restrict or modify public access to it.

Finally, the lease submitted by a building management company provides that the tenant will not install any work covered by VARA without obtaining a waiver of all VARA rights from the artist.

Too few contracts were received to permit any sweeping conclusions. From this limited sample, however, it seems that waiver language is typically broad, even that suggested in legal forms books. Public entities seem to be more vigilant than private commissioning parties in protecting artists' attribution rights: integrity rights are typically conditioned upon the commissioning party's right to remove the work. Sometimes the purchaser's removal right is subject to the artist's right to purchase or remove the work.

## VIII. RECOMMENDATION OF THE REGISTER OF COPYRIGHTS

Congress' intent in enacting VARA in 1990 was to strengthen the extant domestic protection that visual artists enjoyed through state legislation, through the Lanham Act, and through judicial decisions involving theories of copyright, unfair competition, defamation, invasion of privacy and breach of contract.

Congress had reviewed these protections in 1988, and deemed them sufficient to enable the United States to enter the international Berne Convention and to comply with its Article 6 bis. That Article gives authors the right to claim authorship of their works and to object to any distortion, mutilation, or modification of their works that would prejudice their honor or reputation.

In 1990, however, Congress augmented the above-mentioned forms of protection by providing authors of narrowly defined works of visual art with a single, uniform body of federal law protecting the limited moral rights of attribution and integrity. This protection, which applies to works created after VARA's effective date, lasts for the author's lifetime or for that of the last surviving author of a joint work.

VARA allowed the newly created moral rights to be waived by a signed, written agreement specifying the work and the precise uses to which the waiver applies, but Congress asked the Copyright Office to study the waiver provision's operation and to assess whether artists were being coerced as a result of their unequal bargaining power to waive their statutory

moral rights. The House Report accompanying VARA stated, "The Committee intends to ensure that the waiver provisions serve to facilitate current practices while not eviscerating the protections provided by the proposed law."<sup>622</sup> Congress' direction to the Office specified the focus of the Office study:

It is important... for the Congress to know whether waivers are being automatically obtained in every case involving a covered work of visual art, whether any imbalance in the economic bargaining power of the parties serves to compel artists to waive their rights, and whether the parties are properly adhering to the strict rules governing waivers.<sup>623</sup>

The Office conducted extensive research to respond to this congressional directive. After submitting its Interim Report in 1992, the Office reviewed earlier legislative efforts to enact federal moral rights protection and state legislation enacted both before and after VARA. Of ten states that have legislated moral rights-type protection, none has included a waiver provision. Protection is also afforded through state contract and tort law, through the federal Lanham Act, and through selected portions of the federal Copyright Act, including provisions protecting the right to make derivative works and parts of the compulsory license provision to make phonorecords of musical compositions.

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<sup>622</sup> H.R. Rep. No. 514, 101st Cong., 2d Sess. 22 (1990).

<sup>623</sup> *Id.*



The study also reviewed the development and execution of moral rights in foreign countries, particularly those adhering to the Berne Convention. The Convention requires that members provide a minimum level of moral rights protection to assure an author's right to claim authorship of his or her work and to object to any modification of the work that would prejudice his honor or reputation, but leaves implementation of these provisions to individual member nations. The laws of foreign nations vary in their scope of moral rights protection, and even the most protective or restrictive laws may be tempered by court interpretation. None of the laws reviewed, except those of the United Kingdom and Canada, contains express waiver provisions. In both the United Kingdom and Canada, the rights of paternity and integrity may be waived by a written instrument.

The Office's review of moral rights in United States case law revealed only one case, Carter v. Helmsley-Spear, Inc., that accorded protection under VARA. On appeal, the Circuit Court in that case found that the sculpture in question was a work made for hire, and thus removed the case from the ambit of VARA protection. Thus, there has been little guidance on the interpretation of VARA.

Against this research framework, the Office conducted a survey and held a public hearing to acquire first-hand knowledge from artists, artists' representatives and buyers about art transactions, VARA awareness, and the parties' contractual experience with waiver. More than 1000 persons filed written survey responses, including 955 visual artists from 47 states and the District of Columbia. The survey produced a wealth of information relevant to the inquiry. It

was augmented by responses to the Office's published request for oral and written comments. The public hearing permitted the Office to question members of panels representing artists, artists' representatives, academics, and property owners. Finally, the Office examined 12 sample contracts containing waiver provisions, to assess to what degree each specifically identified the work and the uses to which waiver applied, as required by VARA.

The Office study revealed some unique characteristics of United States moral rights laws. For example, employment for hire is a key component in United States law. Because works made for hire are outside the scope of VARA, some works of domestic authors are removed from the umbrella of moral rights protection. Similarly, United States law is unusual in including a waiver provision. The Office's conclusions and recommendations are presented below.

#### **A. VARA'S IMPACT ON ARTISTS' BARGAINING POWER**

The Office's public hearing and the comments elicited a predictably broad spectrum of opinion on the effectiveness of VARA and the impact of its waiver provisions. The operation of the waiver provision is so far somewhat ephemeral. The Office report shows that the vast majority of artists do not have a written contract for commission of their visual art works. Because most sales are unaccompanied by a written agreement and because VARA requires that waivers be in the form of signed written agreements that specify the work and the uses of the work to which the waiver applies, relatively few waivers exist. More fundamentally, written

and oral testimony solicited by the Office revealed that many artists (particularly those earning less than \$10,000 annually from sale of art) and art consumers are unaware of federal statutory moral rights, and are particularly unaware of VARA's waiver provisions. When advised of the possibility of waiving moral rights, no clear opinion emerged from either artists or users as to whether the existence or abolition of waiver might have a chilling effect on artists' employment. Some respondents argued that absent a waiver, users would not contract for the creation of major works of visual arts. Others opined that the statutory presence of a possible waiver forces artists, by their need for employment, to waive their moral rights.

In both cases, the opinions were often based on reasoned assumptions rather than empirical evidence. Artists earning more than \$25,000 annually from their art works and those represented by agents or dealers had the most experience with waivers. The experiences documented showed that nearly one-quarter of responding artists knew of artists who had been asked to waive their moral rights, and that thirteen percent of responding artists had refused contracts because they included waivers. Of those responding artists who expressed an opinion, about half believed that rejection of the waiver would abort the deal.

## **B. VARA AWARENESS**

Several participants in the Office's public hearing and comment period asserted that it is too early to measure the effects of waiver given the low level of VARA awareness. Clearly, no assessment of the impact of VARA's waiver provisions is valid unless affected parties are

knowledgeable about their rights and responsibilities. The Office attempted to educate artists and purchasers by including a synopsis of VARA rights in its survey, by disseminating the survey widely through arts organizations, state art councils, volunteer lawyers for the arts, and art schools, and by mailing it to art lawyers, agents, dealers, associations, and those who work with visual artists. The Office also participated in seminars that addressed artists' rights issues, and prepared an article explaining VARA, which it distributed to arts organizations, to art publications, and on the Internet.

Despite these educational efforts, however, because individual artists often are not members of an organized arts community, many remain unaware of their legal rights. The Office suggests that further VARA education is needed. The Office will develop a VARA fact sheet to be distributed in response to public inquiries, and will continue to include discussion of VARA's provisions in public speeches and seminars. The Copyright Office encourages the arts community to take further measures to inform individuals about VARA rights and responsibilities. These efforts should include articles in critical art journals, distribution of information at art fairs, and inclusion of VARA information in art school curricula. Until educational efforts succeed in raising the art community's consciousness about VARA rights, assessments of the impact of VARA's moral rights waiver provisions will necessarily be inconclusive.

### **C. SPECIFICITY OF CONTRACT LANGUAGE**

Another focus of the Office inquiry was whether language in art contracts waiving moral rights is specific enough to satisfy requirements of the statute. Under section 106A(e), VARA rights may be waived if the author expressly agrees to the waiver in a written instrument that specifically identifies "the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified."<sup>624</sup>

What exactly did Congress mandate by requiring the contract to identify specifically the "uses" of the work to which the waiver applies? The House Report merely echoes the statutory language, adding only that "The bill does not permit blanket waivers."<sup>625</sup> The results of the Copyright Office survey on this question were inconclusive. Only 32 percent of all respondents knew moral rights can be waived only by an express signed agreement that specifies the work and uses of the work to which the waiver applies. Only 17 percent of respondents had seen art contracts containing a moral rights waiver, and of those respondents who had seen waivers and expressed an opinion, only 46 percent responded that the uses of the works were sufficiently identified, and 66 percent reported the waivers they had seen specifically identified the work to which the waiver applies.

The Office also considered whether contracts submitted in response to its public inquiry were sufficiently clear. The Campbell's Soup contest language, for example, gave Campbell's the right to use or dispose of artworks as it sees fit. Entrants gave up all "rights to bring...any

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<sup>624</sup> 17 U.S.C. § 106A(e).

<sup>625</sup> H.R. Rep. No. 514, 101st Cong., 2d Sess. 19 (1990).

claim, action or proceeding against" the soup company, and agreed that they had "no right of review or approval of how their artwork or entries will be used" and "waive any rights of attribution." Does this language satisfy the statute or is it a blanket waiver?

Some contracts for installation in a specific location, such as that of the Massachusetts Bay Transportation "Arts-on-the-Line" project and Los Angeles County Metropolitan Transportation Authority, seem to be more in accord with Congress' intent in that they follow the statutory scheme of section 113(d) by waiving certain integrity rights if damage or modification is necessary to remove the work but assuring the attribution right. The Philadelphia Convention Center contract guarantees best efforts not to damage the work, but acknowledges that installation and removal may cause damage; and the artist waives the integrity right with respect to the installation. The GSA contract takes a different approach, attempting to limit by agreement those characteristics of the work subject to protections of the VARA integrity right, and the artist agrees to waive protection for all other aspects and uses of the work.

Perhaps most troubling on this point is the waiver of moral rights language proposed in the Nimmer on Copyright treatise. The Nimmer treatise acknowledges the VARA requirement but states, "It is assumed for present purposes that the primary use is as a work of visual art; the statute does not require that every use be described in the waiver."<sup>626</sup> Because waiving moral rights in a work of visual art for use of the work as a work of visual art seems somewhat

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<sup>626</sup> 6 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §28.06 (Form 28-5).

circuitous, the question becomes whether the statutory requirement of specificity is vague. The Copyright Office recommends that Congress consider clarifying the statute to indicate more directly what it intended by requiring that waiveability specifically identify the uses to which waiver applies.

#### **D. MODIFICATION OR REPEAL OF WAIVER**

A consensus developed at the public hearing and in written testimony that waivability is necessary for works incorporated into buildings. Individual artists and representatives of arts organizations, as well as property owners, maintained that to repeal waiver for works incorporated into buildings would have a chilling effect on artistic production because property owners would be unwilling to commit to installation of a permanent structure if they could not secure a waiver of the artist's moral rights. Property owners further argued that tenants should not be able to commit building owners to moral rights obligations with respect to installed works. The Office endorses these consensus views and agrees that section 113(d)'s waiver provisions should be retained. It seems that any problems incurred as a result of a tenant contracting for installation of art works in a building could be avoided by contractual agreements between the landlord and tenant, and that no modification of section 113 is needed at this time.

A near consensus was voiced by artists and their representatives, as well as one academic, but was not shared by property owners or their lawyers, on the need for modification of section 106A's waiver provision. Proponents argued that artists who create moveable works

of art, a category that includes the bulk of visual arts works, should enjoy absolute moral rights that are not subject to waiver. Professor Damich argued, with respect to moveables, that one should not be able to waive the integrity right by advance contract, but only to modify it by the artist's revocable consent to a specific alteration. He further argued that the attribution right should be capable of waiver for some works, such as anonymous works, pseudonymous works, or works altered with the author's consent. As mentioned above, these opinions were generally based upon reason or upon the belief that the concept of waiver is an anathema to the principle of moral rights, and that artists' weaker bargaining position relative to buyers renders them unable in practical terms to refuse to waive their moral rights.

The Office was unable to determine whether the equities as between artist and buyer were any different from those existing when VARA was enacted. No contractual evidence or case law guidance was adduced to indicate whether modification of the waiver provisions, for example, to eliminate waiver for all but non-moveable art (where the commissioning party arguably has a justifiable interest in controlling the work), would strengthen artists' bargaining power or negatively affect their employment or earnings. There was no evidence that galleries are refusing to sell works without waivers. Nor could the Office assess from available sources whether modification or abolition of waiver would affect established artists to the same degree as lesser-known artists, although the Office survey did reveal that artists who earned more than \$25,000 from their art and those who were represented by an agent were most likely to refuse or modify contracts that contained waiver clauses.



Because most contracts for sale of moveable art are oral and thus cannot include a valid waiver, perhaps no legislative change on waivability for moveables is warranted at this time. Artists who contract orally for sale of their works enjoy all moral rights accorded by VARA, with no possibility of waiver. Unless written contracts for moveables become more prevalent, VARA will at least have strengthened artists' rights in the letter of the law. If Congress considers abolishing waivability for one or both moral rights in moveable works, however, it should consider whether installed works that are not incorporated into a building, such as site-specific works, major commissioned works, and large government commissions should continue to be subject to waiver even if other moveables are not. Abolishing waivers for these works, in the view of some witnesses, would lessen buyers' willingness to contract for their production.

If waiver is retained for moveable works, the Office suggests that Congress consider amending section 106A to parallel section 113(d)(2) to assure creators of all statutory works of visual art the right within a specified period to remove or pay for removal of their works before the work are to be destroyed or mutilated. By so doing, artists' integrity rights would be strengthened without abolishing purchasers' statutory rights to secure a waiver.

## **E. JOINT AUTHORS' WAIVER**

Under section 106A(b), the authors of a joint work of visual art are co-owners of the moral rights conferred by VARA in that work. Section 106A(e)(1) authorizes an author of a joint work to waive moral rights for all joint authors. A point of near consensus in the public proceedings, voiced by artists' representatives and one academic, was that joint authors should not have this statutory power to waive moral rights for their co-authors. Professor Damich, for example, argued that the provision contravenes the spirit of moral rights and the statutory prohibition on transfer of those rights.

Nimmer's treatise on copyright, noting that joint authors of a work of visual art are tenants in common, states that the provision permitting joint authors to waive moral rights for the whole makes "some sense" with respect to waivers of the integrity right, but maintains that "it makes little sense to apply [the] provision to waivers of the attribution right..."<sup>627</sup>

The Copyright Office believes the present statutory ability under VARA permitting one joint author to waive moral rights of other joint authors, although undoubtedly designed to parallel joint authors' economic rights, seems an unnecessary derogation of moral rights. The Office suggests that Congress amend this provision to provide that no joint author may waive another's statutory moral rights without the written consent of each joint author whose rights would be affected.

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<sup>627</sup> 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §8.21[B].

## **F. OTHER ISSUES**

A plethora of other issues emerged at the Office's public proceedings. None evoked a consensus and all seemed beyond the scope of the Office's mandate. The issues included recommendations to extend the scope of VARA to cover all works of visual arts and to protect covered works against distortions in print and broadcast reproductions and in books, magazines and on-line media. One witness suggested adopting a formal notice of waiver, similar to the notice of copyright, to advise the public when waivers have been granted. The Office would oppose any such formality as contrary to the Berne Convention and potentially damaging to artists' interests as a possible public invitation to modify the work. Section 113(d)(3) provides for some notice to the public by establishing a VARA registry in the Copyright Office to permit authors of works of visual art incorporated into buildings to record their identities and addresses and to allow building owners to record evidence of their efforts to comply with section 113's notification before removal requirements. Since 1991, only one entry has been submitted to this registry. The Office will include information on this artists' registry in the VARA information sheet it will prepare for distribution to the public.

Others suggested that duration of VARA rights be made coextensive with the term of copyright, rather than expiring at the artist's death. One witness argued that the integrity right should be expanded to include the right to complete a work. Building owners asserted that VARA rights amounted to an unconstitutional "taking" and might conflict with building and fire codes.

These and other issues presented by the commentators are all important, but in many cases the arguments were aired in the Congressional hearings on VARA; Congress' decision is embodied in the present statute and the Office deems these issues to be beyond the scope of this study. Given the widespread lack of knowledge in the artistic community about moral rights, the low level of contractual experience with waivers, and the absence of judicial guidance on VARA interpretation, Congress may decide to reexamine the impact of waiver of moral rights and other related policy issues at some future time. It may then consider whether these other issues warrant further deliberation.

**FINAL REPORT OF THE REGISTER  
OF COPYRIGHTS  
WAIVER OF MORAL RIGHTS  
IN VISUAL ARTWORKS**

**Appendix**

**WAIVER OF MORAL RIGHTS  
IN VISUAL ARTWORKS**

**Appendix**

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**§ 106A. Rights of certain authors to attribution and integrity**

(a) **RIGHTS OF ATTRIBUTION AND INTEGRITY.**—Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—

(1) shall have the right—

(A) to claim authorship of that work, and

(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and

(3) subject to the limitations set forth in section 113(d), shall have the right—

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

(b) **SCOPE AND EXERCISE OF RIGHTS.**—Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner. The authors of a joint work of visual art are coowners of the rights conferred by subsection (a) in that work.

(c) **EXCEPTIONS.**—(1) The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A).

---

A new section 106A was added by the Visual Artists Rights Act of 1990, Pub. L. 101-650, 104 Stat. 5128. The act states that, generally, it is to take effect six months after the date of its enactment, that is, six months after December 1, 1990, and that the rights created by section 106A shall apply to—(1) works created before such effective date but title to which has not, as of such effective date, been transferred from the author, and (2) works created on or after such effective date, but shall not apply to any destruction, distortion, mutilation, or other modification (as described in section 106A(a)(3)) of any work which occurred before such effective date.



2 The modification of a work of visual art which is a result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.

(3) The rights described in paragraphs (1) and (2) of subsection (a) shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of "work of visual art" in section 101, and any such reproduction, depiction, portrayal, or other use of a work is not a destruction, distortion, mutilation, or other modification described in paragraph (3) of subsection (a).

(d) DURATION OF RIGHTS.— (1) With respect to works of visual art created on or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, the rights conferred by subsection (a) shall endure for a term consisting of the life of the author.

(2) With respect to works of visual art created before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, but title to which has not, as of such effective date, been transferred from the author, the rights conferred by subsection (a) shall be coextensive with, and shall expire at the same time as, the rights conferred by section 106.

(3) In the case of a joint work prepared by two or more authors, the rights conferred by subsection (a) shall endure for a term consisting of the life of the last surviving author.

(4) All terms of the rights conferred by subsection (a) run to the end of the calendar year in which they would otherwise expire.

(e) TRANSFER AND WAIVER.—(1) The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified. In the case of a joint work prepared by two or more authors, a waiver of rights under this paragraph made by one such author waives such rights for all such authors.

(2) Ownership of the rights conferred by subsection (a) with respect to a work of visual art is distinct from ownership of any copy of that work, or of a copyright or any exclusive right under a copyright in that work. Transfer of ownership of any copy of a work of visual art, or of a copyright or any exclusive right under a copyright, shall not constitute a waiver of the rights conferred by subsection (a). Except as may

otherwise be agreed by the author in a written instrument signed by the author, a waiver of the rights conferred by subsection (a) with respect to a work of visual art shall not constitute a transfer of ownership of any copy of that work, or of ownership of a copyright or of any exclusive right under a copyright in that work.

Part II - Text of 17 U.S.C. §113 d:



**§ 113. Scope of exclusive rights in pictorial, graphic, and sculptural works<sup>1</sup>**

(d)(1) In a case in which—

(A) a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), and

(B) the author consented to the installation of the work in the building either before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, or in a written instrument executed on or after such effective date that is signed by the owner of the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal,

then the rights conferred by paragraphs (2) and (3) of section 106A(a) shall not apply.

(2) If the owner of a building wishes to remove a work of visual art which is a part of such building and which can be removed from the building without the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), the author's rights under paragraphs (2) and (3) of section 106A(a) shall apply unless—

(A) the owner has made a diligent, good faith attempt without success to notify the author of the owner's intended action affecting the work of visual art, or

(B) the owner did provide such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal.

For purposes of subparagraph (A), an owner shall be presumed to have made a diligent, good faith attempt to send notice if the owner sent such notice by registered mail to the author at the most recent address of the author that was recorded with the Register of Copyrights pursuant to paragraph (3). If the work is removed at the expense of the author, title to that copy of the work shall be deemed to be in the author.

(3) The Register of Copyrights shall establish a system of records whereby any author of a work of visual art that has been incorporated in or made part of a building, may record his or her identity and address with the Copyright Office. The Register shall also establish procedures under which any such author may update the information so recorded, and procedures under which owners of buildings may record with the Copyright Office evidence of their efforts to comply with this subsection.

<sup>1</sup> Section 113 was amended by the Visual Artists Rights Act of 1990, Pub. L. 101-650, 104 Stat. 5089, 5128, 5130, which added at the end thereof subsection (d).

Part III - Interim Notice of Inquiry, 57 Fed. Reg. 24,659 (1992)



# ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559

## NOTICE OF INQUIRY

### REQUEST FOR INFORMATION: STUDY ON WAIVER OF MORAL RIGHTS IN VISUAL ARTWORKS

The following excerpt is taken from Volume 57, Number 112 of the *Federal Register* for Wednesday, June 10, 1992 (pp. 24699-24662)

#### LIBRARY OF CONGRESS

#### Copyright Office

(Postal Box, 99-01)

Request for Information: Study on Waiver of Moral Rights in Visual Artworks

Author: Copyright Office, Library of Congress.

ASTOR: Notice of Inquiry.

**summary:** This Notice of Inquiry is issued to inform the public that the Copyright Office is examining the extent to which authors are waiving moral rights in their visual artworks under the waiver provisions of the Visual Artists Rights Act, which amended the Copyright Act, title 17, U.S. Code by adding section 109A, Section 109 of the Visual Artists Rights Act allows the Copyright Office to prepare a study on waivers of moral rights within five years of enactment. An interim report on the progress of the study is due on December 1, 1992, two years after the effective date of the law. The Office seeks public comments on such information about artists' contracts for the purpose of investigating how the waiver provision is working. We also seek information that will assist the Office in developing a survey of artists' contracts.

**ASTOR:** Comments should be received on or before September 8, 1992.

**ASTOR:** This should read:

**ASTOR:** James Madison Memorial Building, Room \*

**ASTOR:** This should read:

**ASTOR:** "developing to artists' contracts that"

**summary:** Interested persons should submit two copies of their written comments to follow: If sent by mail:

Dorothy Schroder, General Counsel  
United States Copyright Office, Library of Congress, Department 17,  
Washington, DC 20540.

If delivered by hand: Office of the Register of Copyrights, Copyright Office, James Madison Memorial Building, room 407, First Street and Independence Avenue, SE, Washington, DC.

**FOR ASTOR:** interested persons contact: Dorothy Schroder, General Counsel, Copyright Office, Library of Congress, Department 17, Washington, DC 20540. Telephone: (202) 707-6000.

**summary:** Interested persons. On December 1, 1990, President Bush signed into law Public Law 101-668. Title VI of this legislation contained provisions regarding visual artists certain rights of attribution (rights to receive name credit) and integrity (rights against distortion of visual art works). These rights, also known as moral rights, became generally effective on June 1, 1991. The most controversial feature of the legislation was whether or not the bill should provide for waiver of the moral rights, because of a concern that artists would be encouraged to waive their rights without receiving fair compensation. Congress decided, therefore, to continue to monitor this provision to see whether problems were developing in artist's contracts that \*

readily provided for waiver of their moral rights. To that end, section 602 (a) of the legislation directs that:

The Register of Copyrights shall conduct a study on the extent to which rights conferred by subsection (a) of the section 109A of title 17, United States Code, have been waived under subsection (a)(1) of such section. <sup>1</sup>

A progress report is to be presented to Congress two years after the date of enactment (December 1, 1992), and a final report is to be submitted not later than five years after the law was enacted (December 1, 1995). The present Notice is designed to assist the Copyright Office in fulfilling this mandate.

#### 1. Impact of Berns Convention Adherence

On March 1, 1988, the United States adhered to the Bern Convention.<sup>2</sup> The provisions for moral rights had long been considered a principal difference between U.S. law and the Bern Convention. Before 1988, the United States had pushed for a worldwide copyright treaty on the Universal Copyright Convention (UCC), a substantial treaty to which the United \*

<sup>1</sup> Visual Artists Rights Act of 1990, Pub. L. 101-668, 104 Stat. 5128, 17 U.S.C. 109A (1990) hereinafter "VAAIA."

<sup>2</sup> The Convention for the Protection of Literary and Artistic Works, signed at Bern, Switzerland, on September 8, 1886. The United States adhered to the 1979 final text of the Convention, Sec. 14. *Relevant Provisions on Copyright*, App. 1.

**ASTOR:** This should read:

**ASTOR:** 104 Stat. 5128, 17 U.S.C. 109A (1990)

**ASTOR:** hereinafter

**ASTOR:** This should read:

**ASTOR:** Relevant Provisions on Copyright, App. 21."

ML-445

June 1992-500

**ASTOR:** This should read:  
"Visual Artists Rights Act of 1990, Pub.L.101-698."



The VARA states that these rights may not be transferred, but [they] may be waived if the author expressly agreed to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified. In the case of a joint work prepared by two or more authors, a waiver of rights under this paragraph made by one such author waives such right for all authors.<sup>12</sup>

The fact that one joint author may waive rights in the work for all joint authors follows traditional United States copyright law, in that one coauthor may license a work without agreement with the other coauthors, subject to an obligation to account for profits generated from licensing the work.

The legislative history of the VARA emphasizes that waivers and the circumstances surrounding them must be narrowly circumscribed. Waivers will be valid only if the parties follow the rules set forth in subsection (k)(1) of section 108A. Noting that the bill in essence permits the author to hold harmless activity that would otherwise violate the law, the House Judiciary Committee further stated that:

A waiver applies only to the specific person to whom waiver is made. That person may not subsequently transfer the waiver to a third party. Any third parties must obtain waivers directly from the author.<sup>13</sup>

To further evidence the specificity of the waiver provision, the Committee reemphasized that blanket waivers are prohibited and that waivers apply only to a specifically identified work and a particular use. Additionally, waivers may not be implied from the transfer of copyright ownership or transfers of material objects.

Discussions during deliberations on the bill centered around whether providing for waiver might lead to a boiler-plate clause for waiver of moral rights in every contract for sale or other transfer of copyright.<sup>14</sup> Doubts were expressed about whether the statute would be able to contract at arms length. Some critics said the waiver provision envisioned the moral rights otherwise considered by the VARA.

<sup>12</sup> 17 U.S.C. 109A(k)(1).  
<sup>13</sup> The Visual Artists Rights Act of 1990, H.R. Rep. No. 816, 101st Cong., 2d Sess., 10-50 (1990).  
<sup>14</sup> See, Donald Stewart, The Visual Artists Rights Act of 1990, 20 *Conn. U.L. Rev.* 663, 685 (1992), 1992.

Error: line should read:  
"17 U.S.C. §109A(k)(1)."

Error: line should read:

"authors can benefit from licensing their"

Error: line should read:

"power in dealing with established manners"

Although the laws of numerous countries of the Berna Convention adopt varying measures to protect moral rights, they are generally broader than those granted by U.S. law. The laws of France provide that moral rights are inalienable and non-waivable. Under French law, for example, an American motion picture director ultimately prevailed in an action to prevent the performance of a motion picture colorized without the director's consent.<sup>15</sup>

On the other end of the spectrum is the United Kingdom's moral rights law of 1989,<sup>17</sup> which grants such rights to authors of literary, musical and artistic works, including motion pictures. The Copyright, Designs and Patents Act makes the rights of attribution subject to waiver and consent (only). A further limitation is that the British law requires the author affirmatively to assert his right of attribution.

#### 4. Freedom of Contract vs. Unwaivable Protections

Precisely because of varying degrees of overall uncertainty about the long-term validity of the waiver provision, Congress directed the Copyright Office to report on artists' experiences in a national legal environment where waivers are freely available to a transferor.

Two fundamental questions about any waiver are: (1) Whether the author made an intentional relinquishment or abandonment of a known right or privilege, and (2) whether the right was voluntarily and intelligently waived. The argument is favor of artists' freedom to contract every moral right is that authors can benefit for licensing their rights in a free market; the opposing argument is that most authors lack the bargaining power to negotiate at arms length—publishers can compel authors on an "accept this or get nothing" basis.<sup>18</sup> In weighing these two conflicting concepts—contractual freedom or paternalistic safeguards for authors, the public policy of maintaining the integrity of artwork's provenance must also be considered. The copyright law protects the author's economic interest despite the reality of his or her

<sup>15</sup> Turner Broadcasting Co. v. Amazon Com. Co., 69-568 (May 25, 1991).  
<sup>17</sup> Copyright, Designs and Patents Act, 1989, § 17.  
<sup>18</sup> See, *Comstock v. Country of Michigan Times Co.*, 724 F.2d 1081, 1088 (6th Cir., 1984).

Error: line should read:

"See, 17 U.S.C. Sec. 203(b)(4), 304(c)(6)(D)."

304(c)(6)(D)."

bargaining positions to the reversal and termination provisions, for example, by providing that these rights cannot be irreversibly transferred before the interest vests.<sup>19</sup>

In passing the VARA, Congress decided to follow the common law rule favoring freedom of contract and made moral rights waivable in the face of substantial concern that detrimental practices are difficult to dislodge once in place. The basic task for the Office will be to report on whether, in the short period since the VARA became law (June 1, 1991), Congress's purpose has been realized or frustrated. To monitor contractual development, Congress has directed the Office to submit an interim report in a relatively short time, eighteen months after the effective date, followed by a full report in 1995—on the effectiveness of the waiver provision in achieving the desired goals—to protect the bond between the artist and his or her work, while facilitating marketing of the work.

In order to assist the Copyright Office in preparing these reports, public comment on the subject of moral rights waivers in contracts with artists is invited. The Office especially seeks objective factual information on contracts and contract officers for the purpose of preparing its final report. We also seek comment of an advisory nature on a proposed method of gathering factual information. For example:

1. How can information be gathered on contracts with individual artists who are not of funds with national organizations? Should the Office hold public hearings on artist waivers? Should the Office engage an independent research firm to conduct a survey of artists (assuming funds are authorized by Congress)?
2. Should the Office conduct surveys of artists' rights in foreign countries, particularly France, Germany, and Great Britain?
3. Are there any other methods of gathering factual information about waiver of moral rights?

In addition, we specifically request comment on the following questions:

1. What constitutes relative equivalence of bargaining power? Do even well-known artists inherently have unequal bargaining power in dealings with established publishers and other organizations?
2. Are waivers of moral rights regularly included in artists' contracts? Are the parties

<sup>19</sup> See, 17 U.S.C. 109A(k)(1), 304(c)(6)(D).



to contracts generally aware of the provisions of the law granting integrity and attribution rights to authors? To what extent is any failure of contract language to mention waivers due to lack of knowledge about the new law?

3. How specific are the contracts? Are the works sufficiently identified? Are the uses particularly identified?

4. Do those who secure waivers exercise them or are waivers secured simply as "insurance policies"?

5. What is the ratio of attribution waivers to waivers of the right of integrity? Are waivers given for artistic work to be incorporated in buildings proportionately greater than waivers for other works?

6. In what kinds of contracts are waivers included—contracts for sale of the work of

art; for copyright ownership; to commission a work of art; stand alone waivers? Are the waivers limited in time? Do artists find any particular offers for waiver disturbing?

7. What is the economic effect of the inclusion of a waiver in a contract? Does the waiver bring a separate price? Is the price of the work or other thing exchanged for value significantly lower than the market price when waiver is not included?

8. Does the artist's experience or renown<sup>4</sup> have any effect on the presence, absence, or nature of a waiver in a contract? What effect?

9. Do the same factors that influence artists' decisions to waive rights of attribution and integrity influence their decisions to enter into other contracts?

10. Might constitutional problems be created by a new provision prohibiting

authors from waiving their artists' rights?

11. Do public contracts differ in the extent or nature of waivers offered in contracts with artists?

Copies of all comments received will be available for public inspection and copying between the hours of 8.30 a.m. and 4 p.m., Monday through Friday, in room 401, James Madison Memorial Building, Library of Congress, First Street and Independence Avenue SE, Washington, DC.

Dated: June 4, 1982.

Ralph Omen.

Register of Copyrights.

[FR Doc. 82-13844 Filed 6-6-82, 8:45am]

8213844 1410-07-8

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<sup>4</sup>Error: line should read:

"8. Does the artist's experience or renown"

Part IV - Article

U.S. Copyright Office Conducts Study  
on Waiver of Visual Artists' Rights

The U.S. Copyright Office is conducting a study on waivers of moral rights in visual art.

Imagine you're a young artist commissioned to paint a mural for a fashionable downtown office building and you create a brilliant avant-garde work. But now the landlord wants to redesign the lobby for a more conservative look and your piece doesn't fit the plan.

Or imagine you're a well-established artist and someone decides to cut one of your paintings into several smaller pieces and sell them off for a substantial profit.

As the artist, you may have rights in these situations under U.S. copyright law.

The Visual Artists Rights Act of 1990 (VARA) gives artists working in certain media the rights of integrity and paternity in their work. Integrity is the right to prevent alteration or mutilation of your work. Paternity is the right to claim authorship or to refuse to identify yourself with a work if it has been modified against your wishes.

These so-called "moral rights" were adopted from the European system of intellectual property law. They differ from the more economic or property-based rights of traditional U.S. copyright law, but were added after the United States adhered in 1989 to an international treaty called the Berne Convention for the Protection of Literary and Artistic Works.

The moral rights of integrity and paternity granted by VARA apply to works of painting, sculpture, printmaking, or exhibition photography created in a single copy or a signed, limited edition of 100 or fewer. These rights may be waived by the artist in a signed, written agreement that specifies the work and use of the work in which moral rights are being waived.

Congress was concerned that in contractual negotiations, artists might be required as a matter of course to waive these rights, and asked the Copyright Office to conduct a study on the extent to which visual artists waive their moral rights. The study is due to Congress on December 1, 1995.

The Office has put together a survey for artists, art groups, lawyers, agents, dealers, and others who work with visual artists. If you are interested in participating, please respond to the survey accompanying this article or contact the Office for a copy.

Address inquiries to:

VARA Waiver Study  
Copyright GC/I&R  
P.O. Box 70400  
Southwest Station  
Washington, D.C. 20024

Part V - Survey

**Effect of Waiver Provisions on Artists  
Covered by the Visual Artists Rights Act:  
U.S. Copyright Office Survey**

**Purpose and Instructions:**

The Visual Artists Rights Act (VARA) of 1990 gives the author of a "work of visual art," as defined in the Act, the rights of attribution (right to receive name credit) and integrity (right to prevent distortion of work). These are sometimes referred to as "moral rights." See 17 U.S.C. §§101 and 106A (reproduced on page six of this survey).

In preparing a report for Congress, we need to determine how authors of works of "visual art" are affected by the waiver provisions in VARA. This survey is designed to elicit information on those effects. The survey has four parts. All participants should answer Parts I and III. Only VARA visual artists, as defined below, need to answer Part II. Part IV is for any additional comments and is optional. Please check the appropriate response or responses or complete your answer in the space provided. Unless otherwise directed, please return your survey no later than January 15, 1995, to VARA Waiver Study, Copyright GC I&R, P.O. Box 70400, Southwest Station, Washington, D.C. 20024. Thank you for your participation.

**PART I**

1. Before receiving this survey, were you aware that artists who created certain visual works had moral rights in works of visual art?

\_\_\_\_\_yes \_\_\_\_\_no

2. a. Before receiving this survey, were you aware that these rights can be waived? See 17 U.S.C. §106A(e) (reproduced on page 6).

\_\_\_\_\_yes \_\_\_\_\_no

- b. Were you aware that an artist can waive these rights only by an express, written agreement signed by the artist, specifying the work and uses of the work to which the waiver applies?

\_\_\_\_\_yes \_\_\_\_\_no

3. This survey uses the term "visual artist" to refer to an author of a "work of visual art" as defined by 17 U.S.C. §101. (See definition below at note 1.)

- a. Do you feel you are covered by that definition?

\_\_\_\_\_yes \_\_\_\_\_no

- b. If you are not covered by that definition, what is your connection to the art world?

\_\_\_\_\_professor \_\_\_\_\_art historian \_\_\_\_\_art student

\_\_\_\_\_art lawyer \_\_\_\_\_artist who creates works not covered by VARA

other (specify) \_\_\_\_\_

**If you are not a visual artist as defined in VARA, please go to Part III of the survey.**

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A VARA visual artist is one who creates a painting, drawing, print, sculpture or still photographic image for exhibition purposes in a single copy or limited edition of 200 copies or fewer that also meets the other criteria set out in 17 U.S.C. §101 (see page 6).

**PART II**  
Visual artists should answer these questions.

4. What type of artwork do you create?  
\_\_\_\_\_ painting    \_\_\_\_\_ still photo    \_\_\_\_\_ drawing  
\_\_\_\_\_ print    \_\_\_\_\_ sculpture    \_\_\_\_\_ other
5. In what state do you reside? \_\_\_\_\_
6. a. Has your art been exhibited outside your resident state?  
\_\_\_\_\_ yes    \_\_\_\_\_ no
- b. If yes, where? \_\_\_\_\_
7. Are you represented by an agent, artists' representative, or gallery?  
\_\_\_\_\_ an agent    \_\_\_\_\_ an artists' representative  
\_\_\_\_\_ a gallery    \_\_\_\_\_ no representative
8. In an average year, how much gross income does your art work provide?  
\_\_\_\_\_ \$0-10,000    \_\_\_\_\_ \$10,000-25,000  
\_\_\_\_\_ \$25,000-\$40,000    \_\_\_\_\_ \$40,000+  
\_\_\_\_\_ none
9. Does sale of your work provide your sole income?  
\_\_\_\_\_ yes    \_\_\_\_\_ no
10. a. Have you ever waived your rights to attribution or integrity in a signed contract?  
\_\_\_\_\_ yes    \_\_\_\_\_ no    \_\_\_\_\_ don't know
- b. If you answered yes, approximately how many times?  
\_\_\_\_\_ 1-5    \_\_\_\_\_ 6-15    \_\_\_\_\_ over 15
- c. For what reasons have you waived these rights? (Check as many responses as apply.)  
\_\_\_\_\_ to gain exposure    \_\_\_\_\_ to receive additional money  
\_\_\_\_\_ to gain favor with someone    \_\_\_\_\_ to make a sale
- Other (please fill in) \_\_\_\_\_  
\_\_\_\_\_
11. a. Have you ever turned down an offer because the contract contained a waiver of moral rights?  
\_\_\_\_\_ yes    \_\_\_\_\_ no

b. Have you ever insisted that a waiver clause be struck from a contract before agreeing to sign it?

\_\_\_\_\_ yes                      \_\_\_\_\_ no

c. In your experience, does rejection of a request for waiver of these rights usually mean there will be no deal?

\_\_\_\_\_ yes                      \_\_\_\_\_ no                      \_\_\_\_\_ don't know

12. a. Have you ever been pressured or coerced into waiving your moral rights in a work?

\_\_\_\_\_ yes                      \_\_\_\_\_ no

b. If yes, how? \_\_\_\_\_  
\_\_\_\_\_

13. Approximately how often are you commissioned to create a work each year?

\_\_\_\_\_ never                      \_\_\_\_\_ 1-5 times  
\_\_\_\_\_ 6-15 times                      \_\_\_\_\_ more than 15 times

14. Approximately how many of those commissions included waiver requests?

\_\_\_\_\_ none                      \_\_\_\_\_ less than half  
\_\_\_\_\_ about half                      \_\_\_\_\_ more than half

15. Of the waiver requests mentioned in question 14, approximately how many waivers did you grant?

\_\_\_\_\_ none                      \_\_\_\_\_ less than half  
\_\_\_\_\_ about half                      \_\_\_\_\_ more than half

16. Would you be willing to waive these moral rights in future contracts?

\_\_\_\_\_ yes                      \_\_\_\_\_ no                      \_\_\_\_\_ don't know

17. If you answered yes in question 16, in what situations would you be willing to waive these rights? (Check as many responses as apply).

\_\_\_\_\_ to gain exposure                      \_\_\_\_\_ to receive additional money  
\_\_\_\_\_ to gain favor with someone                      \_\_\_\_\_ to make a sale

Other (please fill in) \_\_\_\_\_  
\_\_\_\_\_

18. a. Do you know of other visual artists who have been asked to waive these rights?

\_\_\_\_\_ yes                      \_\_\_\_\_ no

b. If yes, approximately how many artists?

\_\_\_\_\_ 1-5                      \_\_\_\_\_ 6-15                      \_\_\_\_\_ 16 and over

**PART III**

**All participants should answer these questions.**

19. Into what kind of art-related contracts have you entered? (Check as many responses as apply)
- a.  to produce a commissioned work      b.  to purchase a work  
c.  for consignment      d.  to represent as agent or dealer  
e.  to represent as attorney      f.  other      g.  none
20. Have you seen any contracts that contain a clause waiving moral rights in a work of visual art?  
 yes       no
21. The law requires that an artist expressly agree to a waiver by signing a written agreement that specifically identifies the work and the uses of that work to which the waiver applies. Are the waiver provisions that you have encountered in written contracts specific in this regard?  
 yes       no       don't know
- a. Are the works for which waivers are requested sufficiently identified?  
 yes       no       don't know       n/a
- b. Are the uses of the works sufficiently identified?  
 yes       no       don't know       n/a
22. In your experience, if a contract contains a waiver provision, is there a separate price for giving up these rights?  
 yes       no       N/A
23. Does the "art work with waiver" sell for more money than the "art work without waiver"?  
 yes       no       N/A
24. What kind of contracts are most common in the art world?  
 written       oral       don't know
25. In your experience, are waivers of moral rights routinely included in artists' written contracts?  
 yes       no       don't know
26. Are such waivers included in contracts:
- a. For sales of existing artwork?  
 yes       no       N/A
- b. For commissioned artwork?  
 yes       no       N/A



Other contracts (please specify) \_\_\_\_\_

27 In your experience, does rejection of a request for waiver of these rights usually mean there will be no deal?

\_\_\_\_\_ yes          \_\_\_\_\_ no          \_\_\_\_\_ don't know

28 Are waivers usually limited in time?

\_\_\_\_\_ yes          \_\_\_\_\_ no          \_\_\_\_\_ don't know

29 Are waivers requested more frequently for works to be installed or incorporated into buildings than they are for works easier to move?

\_\_\_\_\_ yes          \_\_\_\_\_ no          \_\_\_\_\_ don't know

30 Is one right e.g., the right to attribution or the right to integrity, waived more often than the other?

\_\_\_\_\_ attribution          \_\_\_\_\_ integrity  
\_\_\_\_\_ neither          \_\_\_\_\_ don't know

#### PART IV

31. Please include any additional comments on the issues addressed in this survey or add information to your answer to any of the above questions.

---

VARA contains special provisions relating to work incorporated into a building where the work's removal either would cause its destruction or modification or is governed by an agreement between the artist and the building owner. See generally 17 U.S.C. §113(d).

# PERTINENT SECTIONS OF VISUAL ARTISTS RIGHTS ACT OF 1990

## 17 U.S.C. § 101. Definition of visual art

A work of visual art is---

(1) a painting, drawing, print or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author, or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author

A work of visual art does not include---

(A) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(i) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(ii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.

## 17 U.S.C. § 106A. Rights of certain authors to attribution and integrity (Moral Rights)

(a) **RIGHTS OF ATTRIBUTION AND INTEGRITY.**--- Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art---

(1) shall have the right---

(A) to claim authorship of that work, and

(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

(2) shall have the right to prevent the use of his or her name as the author of the work visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and

(3) subject to the limitations set forth in section 113(d), shall have the right---

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right[.]

### (e) **TRANSFER AND WAIVER**

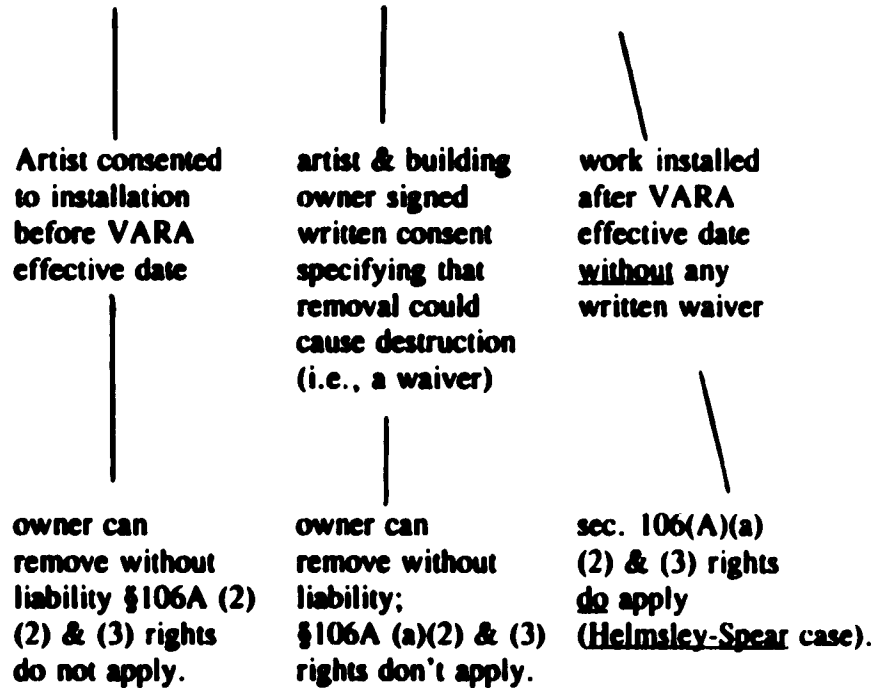
(1) The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such a waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified. . . .

(2) Ownership of the rights conferred by subsection (a) with respect to a work of visual art is distinct from ownership of any copy of that work, or of a copyright or any exclusive right under a copyright in that work. Transfer of ownership of any copy of a work of visual art, or of a copyright or any exclusive right under a copyright, shall not constitute a waiver of the rights conferred by subsection (a). Except as may otherwise be agreed by the author in a written instrument signed by the author, a waiver of the rights conferred by subsection (a) with respect to a work of visual art shall not constitute a transfer of ownership of any copy of that work, or of ownership of a copyright or of any exclusive right under a copyright in that work.

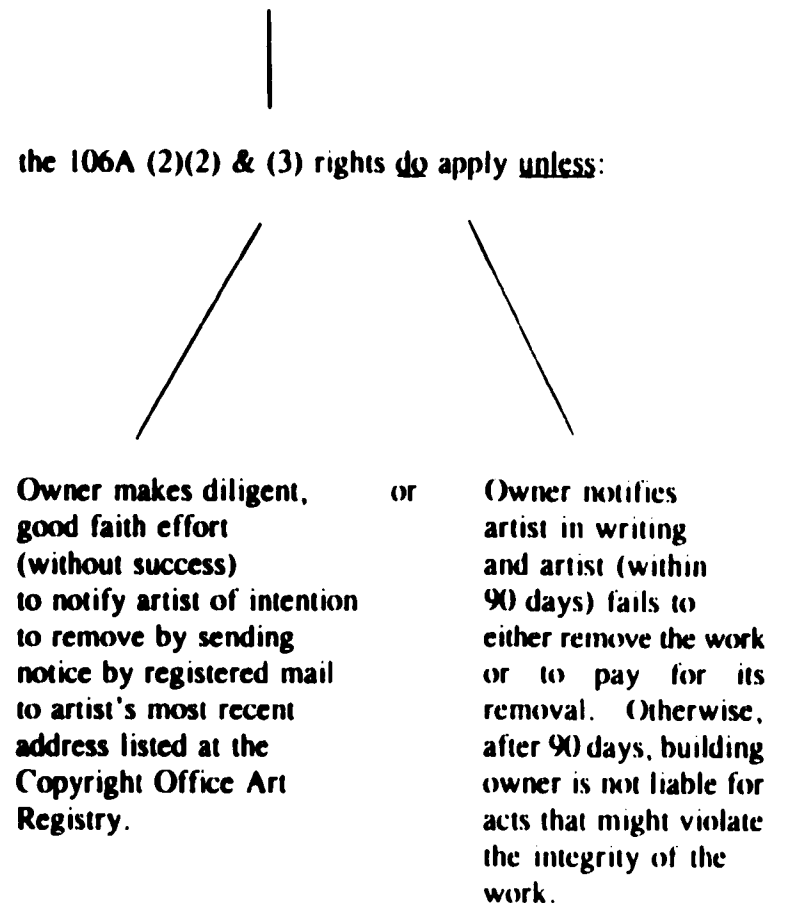
Part VI - Chart: Visual Representation of Section 113 d

**ART WORKS INCORPORATED INTO BUILDINGS**

**THE WORK INSTALLED CANNOT BE REMOVED WITHOUT DESTRUCTION OR DAMAGE**



**THE WORK INSTALLED CAN BE REMOVED WITHOUT DESTRUCTION OR DAMAGE**



Part VII - Notice of Hearing, 60 Fed. Reg. 27, 329 1995.



# ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559-6000

## NOTICE OF HEARING AND REQUEST FOR PUBLIC COMMENT

### REQUEST FOR COMMENTS ON THE WAIVER OF MORAL RIGHTS IN VISUAL ARTWORKS

The following excerpt is taken from Volume 60, Number 99 of the *Federal Register* for Tuesday May 23, 1995 (pp. 27329-27332)

#### LIBRARY OF CONGRESS

#### Copyright Office

[Docket No. 95-5]

#### Request for Comments on the Waiver of Moral Rights in Visual Artworks

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Notice of hearing and request for public comment

**SUMMARY:** The Copyright Office is holding a public hearing to solicit comments on the effect of the waiver of moral rights provision of the Visual Rights Act of 1990 (VARA). Section 608 of VARA requires the Copyright Office to study the effect of VARA's waiver provision and to publish its findings. To fulfill the statutory obligations of section 608, the Copyright Office is examining the extent to which authors waive moral rights in their visual artworks under the waiver provision. The Office also will accept written comments.

**DATES:** The public hearing will be held on Wednesday, June 21, 1995, from 10:00 a.m. to 4:00 p.m. Requests to present oral testimony at the hearing should be received on or before June 16, 1995. Written comments by those persons testifying at the hearing should be received on or before June 19, 1995. All other written comments must be received on or before July 31, 1995.

**ADDRESSES:** Interested parties should submit written comments and requests to present oral testimony by mail to Marilyn J. Kretsinger, Acting General

Counsel, Copyright Office GC/I&R, P.O. Box 70400, Southwest Station, Washington, D.C. 20024, or by hand delivery to the Office of General Counsel, Copyright Office, James Madison Memorial Building, Room LM 407, First Street and Independence Avenue, S.E., Washington, D.C., or by Telefax: (202) 707-8366. The hearing will be held in Room 414, which is located on the fourth floor of the Library of Congress, James Madison Memorial Building, First Street and Independence Avenue, S.E., Washington, D.C. Written comments and a transcript of the hearing will be available for public inspection in the Office of the General Counsel, Copyright Office, James Madison Memorial Building, Room LM-407, First Street and Independence Avenue, S.E., Washington, D.C.

**FOR ADDITIONAL INFORMATION CONTACT:** Marilyn J. Kretsinger, Acting General Counsel, Copyright Office GC/I&R, P.O. Box 70400, Southwest Station, Washington, D.C. 20024. Telephone (202) 707-8389. Telefax: (202) 707-8366.

**SUPPLEMENTARY INFORMATION:** On December 1, 1990, President Bush signed into law the Visual Artists Rights Act (VARA), which was codified as section 106A of title 17 of the United States Code and went into effect on June 1, 1991. VARA grants certain visual artists the moral right of attribution, which is the right to claim or disclaim authorship of a

work, and the moral right of integrity, which is the right to prevent any intentional distortion, mutilation or other modification of a work which is prejudicial to the artist's reputation or honor and to prevent the destruction of a work of recognized stature by any intentional or grossly negligent act. VARA also provides that these rights may not be transferred but can be waived.

The waiver provision was the most controversial portion of VARA. Congress was concerned that artists might be compelled to waive their rights of integrity and attribution. This concern is detailed in the House Report:

The Committee intends to ensure that the waiver provisions serve to facilitate current practices while not eviscerating the protections provided by the proposed law. It is important, therefore, for the Congress to know whether waivers are being automatically obtained in every case involving a covered work of visual art, whether any imbalance in the economic bargaining power of the parties serves to compel artists to waive their rights, and whether the parties are properly adhering to the strict rules governing waiver.

H.R. Rep. No. 514, 101st Cong., 2d Sess. 22 (1990).

To address this concern, when Congress passed VARA it included section 608, requiring the Copyright Office to study the waiver provision to determine whether artists' contracts routinely provide for waiver of moral rights. Specifically, section 608 requires the Copyright Office to study the extent to which the rights conferred by VARA are being waived by visual artists and to present its findings to Congress in an interim report which was submitted on

\*Error. Line should read:  
"Counsel, Copyright GC/I&R, P.O."  
\*\*Error. Line should read:  
"Counsel, Copyright GC/I&R, P.O."  
\*\*\*Error. Line should read:  
"(202) 707-8380. Telefax: (202) 707-"

December 1, 1992, and in a final report which must be submitted by December 1, 1995. The Copyright Office is in the process of preparing this final report.

## I. Background

On March 1, 1989, the United States acceded to the Paris text of the Berne Convention for the Protection of Literary and Artistic Works. Article 6bis of the Berne Convention requires countries to provide protection of the moral rights of paternity and integrity. During the debate on adherence to the Berne Convention, some argued that the United States needed to enact specific moral rights legislation. The vast majority of those seeking adherence contended that existing laws, both Federal and State, statutory and common, were sufficient to meet the requirements of the Berne Convention. Congress agreed with the majority and therefore did not include any substantive moral rights provisions in the Berne Convention Implementation Act. H.R. Rep. No. 514, 101st Cong., 2d Sess. 7-8 (1990).

Congress acknowledged that adherence to the Berne Convention did not end the debate about whether the United States should adopt artists' rights laws and it did enact such a law in 1990; through VARA it created a uniform Federal system of rights for certain visual artists.

The scope of VARA is very narrow; it applies only to works of fine art which are identified as "works of visual art." A "work of visual art" as defined in the Copyright Code includes any painting, drawing, print, sculpture, or still photographic image produced for exhibition purposes, produced in a single copy or an edition of 200 or fewer if signed and consecutively numbered by the artist. 17 U.S.C. 101 (1990). VARA specifically excludes works for hire, motion pictures and other audiovisual works, and works of applied art.

If a work qualifies as a "work of visual art" the author of that work is granted two rights: the right of attribution and the right of integrity. The

right of attribution gives the visual artist the right to be named as author of a work; the right to prevent use of his or her name as author of a work he or she did not create; and the right to prevent the use of his or her name if the work has been distorted, mutilated or modified in a manner that would be prejudicial to the artist's honor or reputation. 17 U.S.C. 106A(a) (1990). The right of integrity allows the artist to prevent intentional distortion or modification of the work that would be prejudicial to the artist's honor or reputation, and to prevent destruction of a work of recognized stature. *Id.*

The rights granted by VARA are not absolute. The integrity rights are subject to special provisions if the work of visual art is incorporated into or otherwise made part of a building. Where such a work of visual art cannot be removed from the building without being damaged or otherwise modified, the moral right of integrity in section 106A will apply unless the work was installed in the building before the effective date of VARA or the artist signed a written agreement acknowledging that the work may be damaged or modified when it is removed from the building. 17 U.S.C. 113(d)(1) (1990). If the work of visual art can be removed from the building without damage or modification, the moral rights in section 106A will apply unless the owner of the building complies with special notice requirements. See 17 U.S.C. 113(d)(2) (1990).

Another limitation on the rights granted by VARA concerns their duration. Despite Berne's general requirement that the term of protection for moral rights be at least coextensive with the term of protection for economic rights, which is the life of the author and fifty years after the author's death, VARA rights endure only for the life of the artist, or where the work is a joint work, the life of the last surviving artist. 17 U.S.C. 106A(d) (1990).

The subject of the study is waiver of the rights of integrity and attribution. Congress explicitly provided that the moral rights of integrity and attribution may be waived. 17 U.S.C. 106A(e) (1990). For a waiver to be valid it must be expressly agreed to in a written instrument that is signed by the artist and that specifically identifies the work and the uses of the work to which the waiver applies. 17 U.S.C. 106A(e)(1) (1990). A waiver will apply only to the work and uses identified in the written instrument. *Id.*<sup>3</sup> In the case of a joint

<sup>3</sup> VARA does not permit blanket waivers and prohibits the specific person to whom the waiver is made from transferring the waiver to a third party. H.R. Rep. No. 514, 101st Cong., 2d Sess. 18-19 (1990).

work, a valid waiver by one author constitutes a waiver of the rights for all joint authors. *Id.*

The Copyright Office published a Federal Register notice on June 10, 1992 requesting information and inviting public comment on the moral rights waiver provision in VARA. 57 FR 24659 (1992). In response to this notice, the Copyright Office received a total of seven comments.<sup>4</sup> Although the comments were helpful, most of them were very brief. At the time of the interim report, VARA had been in effect for only two years and there were few if any measurable effects of the waiver provision. The comments of the seven parties are summarized in the interim report, submitted to Congress on December 1, 1992.

## II. Current Status of the Copyright Office Study

The results of the interim study demonstrated that obtaining information from artists on their experience with the waiver provision for the final report would be a major challenge. The Copyright Office thus began an extensive outreach program aimed at getting factual information on the effects of VARA's waiver provision.

To reach individual artists, the Copyright Office developed a survey questionnaire designed to reveal the effect of VARA waiver provisions on the visual arts community. The survey was modeled in part after the "Volunteer Lawyers for the Arts Visual Artists Rights Act of 1990 Questionnaire" submitted by the Massachusetts Volunteer Lawyers for the Arts in response to the June 1992 Federal Register notice.

One goal of the survey was to determine whether waiver of moral rights provisions are routinely included in art contracts; and, if so, whether this occurs because of the parties' relative bargaining power or for other reasons. Another goal of the survey was to ascertain whether waivers occur only in the context of a written contract, as required by statute, or whether waivers also occur orally.

Following review of the survey by a group consisting of copyright experts and representatives of the art community, the Office revised and distributed the survey questionnaire to hundreds of visual art-related

<sup>4</sup> Comments were received from the Nebraska Arts Council, Professor of Law John Henry Merryman, the Capital Arts Center/BG-WC Arts Commission, the General Services Administration, the Committee for America's Copyright Community, Volunteer Lawyers for the Arts of Massachusetts, Inc., and Volunteer Lawyers for the Arts of New York.

organizations. These organizations consisted primarily of state art councils, volunteer lawyers for the arts associations, and art schools and universities. Altogether, the Copyright Office mailed out more than 6,800 surveys. The actual number of surveys distributed was far greater, however, because many of the surveys were duplicated by the recipient organizations and distributed to still others in the visual arts community.

### III. Preliminary Analysis of VARA Survey

By May 15, 1995, the Copyright Office had received 1063 completed surveys. Our final report to Congress will include a detailed analysis of survey results, but a preliminary analysis of 985 surveys received by mid-April reveals the following data.

#### A. Knowledge of VARA

Even five years after VARA's enactment, survey results indicated that educating artists about their new moral rights is perhaps as critical as the Congressional intent to study the extent to which artists waive these rights. The survey, therefore, fulfilled an educational need. Before receiving the survey, 73 percent of all respondents were aware of moral rights in certain works of visual art. Fifty-eight percent, however, previously were unaware such rights could be waived, and sixty-six percent did not know that waiver requires an express, written agreement. Seventy-nine percent of all respondents said they have not seen contracts that include a waiver provision. Eight percent have waived moral rights in a signed contract, but a full 77 percent have not, and five percent said they did not know.

#### B. Respondent Profile

The majority of responses were from artists. Ninety percent of respondents believed they were covered by the survey's definition of "visual artist" (i.e., one who creates a "work of visual art" as defined by VARA). Of these, 58 percent identified themselves as painters (an artist could check as many media as applied). Only eight percent of respondents were not VARA artists. Of these, five percent created art works not covered by VARA, another two percent were art professors, and the remaining were others associated with the arts.

Most respondents did not earn a significant income from their art. More than half have worked under commission, but 68 percent earned less than \$10,000 from their art in an average year. Five percent claimed income between \$25,000 - \$40,000, and nine percent said their art-related income

exceeded that amount. Roughly half were represented by a gallery or agent, but 42 percent had no representation.\*\*\*\*

#### C. Willingness to Waive Moral Rights

Forty-four percent of artists indicated they were unwilling to waive moral rights in the future. Seven percent would waive such rights; 36 percent did not know whether they would waive these rights, and 123 artists declined to say.

Of seventy-nine individuals who had waived the right of integrity or attribution in a signed contract, 42 said they did so to gain exposure and 37 said they did so to make a sale. Eleven percent had declined a contract because it included a waiver clause, and 13 percent had insisted such a clause be struck before signing. Most artists (58%) did not know whether rejecting a waiver would cost them the contract, but some (15%) thought it would. Eighty-one percent had never been pressured to waive moral rights, but six percent had.

#### IV. Subject Matter to be Addressed at the Public Hearing

To supplement the information gathered through the survey, the Copyright Office will hold a public hearing to solicit comments on the effect of the waiver of moral rights provision in the Visual Artists Rights Act. We anticipate that the hearing will provide an opportunity to obtain more information on existing practices relating to waivers of moral rights in visual art.

The Copyright Office is also interested in studying actual or model contracts that contain language concerning waiver of moral rights. We would like to see examples of as many visual art contracts as possible, especially those with waivers, and would appreciate any party sending us such contracts.

The Copyright Office specifically invites comments on the following questions:

*Awareness of rights.* To what extent are artists aware of VARA and the rights of integrity and attribution provided by VARA? Has awareness of VARA increased? Please give examples.

*Extent of waiver.* Are waiver of moral rights provisions routinely included in artists' contracts? Do parties that obtain waiver of moral rights in a contract exercise the waiver or is a waiver secured merely as an "insurance policy"? Does waiver vary depending on the nature of the work? For example, are mobiles and sculptures treated differently than paintings and prints? Does it vary based on the location of the work, for example,

\*\*\*\*Error, line should read "but 42 percent had no representation."

murals that are part of buildings? What experiences have artists had with owners of buildings? Does it vary depending on the purchaser? Does it matter whether the purchaser is a national or regional institution, an owner of a public or private building, an art collector or investor? Please give examples where possible.

*Contract specifics.* What is the economic effect of a waiver in the course of contract negotiations? Is there any evidence on how much a waiver is worth—that is, how much more a purchaser would pay if the artist waived the right? Are there proportionately more waivers given for artistic works that are included in buildings than for other types of works? When a waiver is included in a contract, does the contract specifically identify the work and use for which the waiver applies? What types of contracts include waivers: contracts for sale of work? contracts for transfer of copyright ownership? contracts for commissioned works? contracts that include only a waiver provision? If a waiver is included in a contract, is that waiver limited in duration? If limited in duration, what is the typical term of the waiver?

*Artists' concerns.* What are the factors artists consider when determining whether to agree to a waiver of moral rights in a contract? Describe any instances where artists were coerced into waiving their moral rights. Has VARA had an effect on commission of visual art?

Do artists have unequal bargaining power when dealing with established galleries and other organizations? If the artist's selling power (demand for his or her works) or reputation affects or determines whether or not waiver will be required, how much experience or how well known does the artist have to be in order to avoid waiver? Give specific examples, if possible.

*Experience in other countries.* What types of experiences have artists had with moral rights abroad? Are artists asked to waive their moral rights in contracts entered into in foreign countries? If so, in what countries?

*Experience with U.S. law.* Should moral rights be waivable? Should the provisions of the Visual Artists Rights Act be amended or modified in any way?

The Copyright Office is interested in receiving public comment on these issues and any other issues relevant to the VARA study.

Dated: May 18, 1995

Marybeth Peters,

Register of Copyrights.

[FR Doc. 95-12606 Filed 5-22-95; 8:45 am]

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**Part VIII - Comment Letters**

**COMMENT LETTERS  
RM 95-5**

**(Waiver of Moral Rights in Visual Artworks)**

**COMMENT NO:**

- 1 Statement of John Carter, Artist**
- 2 Edward J. Damich, Professor, George Mason  
University School of Law**
- 3 Testimony of Deborah L. Benson, Morse, Altman,  
Dacey & Benson**
- 4 Dr. Carol Pulin, Director, American Print  
Alliance**
- 5 National Endowment for the Arts**
- 6 Dr. Theodore H. Feder, President,  
Artists Rights Society (ARS)**

STATEMENT

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This statement is a contribution to the US Copyright Office's public hearing on the waiver of moral rights provision of the Visual Artists Rights Act

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June ~~July~~ 21, 1995

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Earlier this year, a site-specific sculpture by Nancy Holt was dismantled by Gallaudet University in Washington DC. The work had been created specifically for the deaf students of the school and had been designed as a permanent installation.

In 1989 the federal government removed a sculpture by Richard Serra from its specific site even though the artist had made clear from the outset that he would not have taken the commission if he had known that the work might be removed.

Last year a site-specific work created by Johnny Swing, John Veronis and myself was saved from demolition by the Visual Artists Rights Act.

In these formative years of moral rights in the United States, the question seems to be: who will bear the burden for a lack of foresight at the inception of an art commission? In two of the above three cases the artist bore that burden.

VARA has gone a long way towards showing that in the artworld version of divorce court, the artist doesn't always lose the child. There is, however, no substitute for an advance agreement over the future of a proposed work. It is during the negotiation of such "prenuptial agreements" that serious thought should be given to any possible waiver of VARA rights.

Many in the arts community fear that if a waiver of VARA rights becomes commonplace, artists will routinely be forced to forfeit these hard won and long awaited moral rights. Others fear that without a waiver provision, patrons will be afraid to commission or even display works of fine art.

Both fears are well-grounded. As the statute now stands, there seems to be very little choice between full lifetime protection and no protection at all, little choice between art and no art.

I believe that with some well-defined outer limits we could encourage greater dialogue between artists and patrons at the works' inception. The additional suggested

Comment Letter  
RM 95-50  
/

GENERAL COUNSEL  
OF COPYRIGHT

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guidelines should make that job less daunting. Except for these few protective limits, agreements between parties should supersede VARA.

### OUTER LIMITS

- 1) **Works which are not site-specific and which can be moved without destruction or mutilation must not be susceptible to a waiver of rights.** A waiver of protection from alteration or destruction may be signed in specific response to a request by the property owner at the time of the proposed move of the work. Property owners must not be encouraged to avoid all responsibility for maintenance and care with a boiler-plate advance agreement.
- 2) **One artist must not be allowed to waive all VARA rights for co-authors.** This limitation will encourage artists to agree in advance about the future of the work.
- 3) **In the case of short term installation exhibitions in museums and galleries, a work must be protected during the exhibit.** The waiver must be allowed after the exhibit dates to prevent an artist from forcing an institution to provide a permanent home for their work.
- 4) **Artwork contracts must not be susceptible to bankruptcy laws.** It has become too easy for a company to wipe out obligations under the musical chairs philosophy of bankruptcy. Monetary remedies are available for all burdens but they can never compensate for the destruction of an artwork. Currently our work is owned and managed by the same parties as it was at its inception. Since the names of the companies have changed, no one is bound by the agreements which were carefully drafted to protect our interests.
- 5) **If a work is to be permanently installed on real property, the owner must sign the agreement of commission unless VARA rights are waived.** To further avoid disposable contracts, anyone commissioning a work to be installed on another person's property should bear the burden of this misrepresentation. An artist must be protected in this situation. With regards our own dispute, the owner learned of the installation and did not object to the work in the legal documents drafted and submitted in approval of the tenant's

activities. The court determined that this omission was sufficient as permission for our continuation of the work, but it would have been preferable to all parties if the topic had been broached earlier. We might have chosen to make our work removable or chosen not to begin the three-year task if we had known of the owners wishes.

### **SUGGESTED GUIDELINES**

- 1) The Public Commissions office may wish to include a review period to allow for an expression of public sentiment in the form of a hearing. Such a hearing could prevent a permanent exhibit that somehow obstructs a public right, as in the case of Richard Serra's Tilted Arc. After review, a work might then be accorded a kind of landmark status.
- 2) In the case of private commissions, it might be advisable for a standard agreement to be drawn up for use by artists. Without this model, artists would be forced either to sign a patron's version of absolute waiver or face the daunting task of drafting their agreement from scratch without the benefit of costly legal advice. This boiler-plate contract could be written by the copyright commission or by an artists' advocacy group like the Volunteer Lawyers for the Arts.

I will repeat that our ultimate goal should be a greater understanding at the time of the initial negotiation between artist and patron. This process must allow for a great variety of as yet unimaginable possibilities, while providing some absolute securities to all parties to prevent the kinds of mistakes illustrated by the three examples that introduce this statement.

John Carter  
Artist

---

# George Mason University

School of Law  
3401 North Fairfax Drive  
Arlington, Virginia 22201-4498  
Office: (703) 993-8000  
Fax: (703) 993-8088

GENERAL COUNSEL  
OF COPYRIGHT

JUN 23 1995

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June 22, 1995

Ms Marilyn J Kretsinger  
Acting General Counsel  
Copyright GC/I&R  
P O Box 70400  
Southwest Station  
Washington, DC 20024

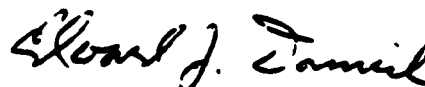
Dear Ms Kretsinger:

Yesterday's hearing was very informative, and I enjoyed seeing you again. I have enclosed with this letter my written comment on the waiver of moral rights in visual artworks. It is substantially the same as my oral comment at the hearing.

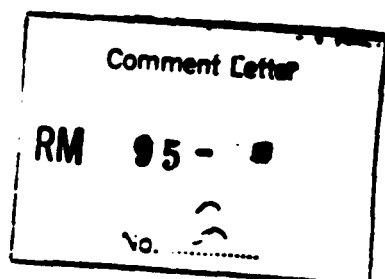
Because I would like to turn this comment into a law review article, I am reserving copyright in it except that I hereby give a nonexclusive license to the Copyright Office or any other entity of the United States government to exercise any of the rights of copyright in it for its official purposes. The Copyright Office or any other entity of the U.S. government may not license any one else to exercise any of the rights of copyright in this work for its private purposes. If this is contrary to U.S. government policy, please advise.

Thank you again for allowing me to testify and comment.

Sincerely,



Edward J Damich  
Professor of Law



**WAIVER OF MORAL RIGHTS  
UNDER THE VISUAL ARTISTS RIGHTS ACT**

by Edward J. Damich  
Professor, George Mason University School of Law  
June 21, 1995

**I. INTRODUCTION**

Madam Register, my name is Edward J. Damich. I am a professor of law at George Mason University School of Law. Thank you for the opportunity to present my views. Although I am a member of the board of the Washington Area Lawyers for the Arts (WALA), I am presenting my personal views this morning. I am not here as an official representative of WALA.

My remarks will be limited to the last two questions of the hearing notice: Should moral rights be waivable? Should the provisions of the Visual Artists Rights Act (VARA) be amended or modified in any way? Furthermore, my remarks will be limited to the VARA's basic waiver provision, section 106A(e); therefore, I will not comment on works of visual art incorporated in buildings, which are provided for by a separate section of the Act.<sup>1</sup>

**II. NARROW RANGE OF WORKS COVERED**

It is important to begin with a clear notion of the narrow range of works covered by the VARA and the limited scope of the rights recognized.<sup>2</sup>

Basically, the VARA covers the original copy of paintings, pieces of sculpture, drawings, photographic images prepared for exhibition purposes only, and very limited editions of them.<sup>3</sup> Other than these very limited editions, reproductions are not covered.<sup>4</sup> In the case of the right against destruction, only works

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<sup>1</sup> 17 U.S.C. § 113(d) (1994).

<sup>2</sup> Pub. 101-650, 104 Stat. 5128, 17 U.S.C. § 106A (1990).

<sup>3</sup> 17 U.S.C. § 101 "work of visual art" (1994).

<sup>4</sup> 17 U.S.C. § 106A(c)(3) (1994). By its terms this section does not exclude all reproductions from moral rights protection, but rather states that they are not applicable to "any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of "work of visual art" in section 101." The list of items in section 101, however, is so extensive that it is hard to identify a reproduction to which the VARA might apply.

"of recognized stature" are covered.<sup>5</sup> Works created by employees within the scope of their employment are not covered.<sup>6</sup>

With the VARA we are not confronted with such hard questions as colorizing black and white motion pictures, making rap versions of popular love songs, bad copies of works of art on compact discs, and massive editing and ghost-writing.

There are serious, legitimate concerns about the effect that moral rights--waivable or not--would have on the publishing industry, the filmmaking industry, the computer industry, the music and recording industry, etc., and I do not believe that moral rights should be recognized in those contexts without reasonable accommodations to the needs of those industries. Furthermore, the scope of waiver for the works covered by the VARA should not necessarily be a precedent for other works.

In the case of the VARA, however, a stricter standard is justified, because, for the most part, we are talking about one-of-a-kind works of art, works which by their very definition would be lost forever if they were to be altered physically.

### III. LIMITED SCOPE OF THE RIGHT OF INTEGRITY

Not only does the VARA cover a narrow range of works, it also carefully circumscribes the kinds of acts that infringe the right of integrity.

In the case of the right of integrity, the VARA does not forbid just any distortion, mutilation or other modification. The act must be intentional, and it must be prejudicial to the artist's honor or reputation.<sup>7</sup> Infringement of the right against destruction includes grossly negligent as well as intentional acts, but remember, it protects only works of recognized stature.<sup>8</sup>

The right against modification is not infringed because of changes that take place because of the passage of time or because of the inherent nature of the materials.<sup>9</sup> Normal conservation and

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<sup>5</sup> 17 U.S.C. § 106A(a)(3)(B) (1994).

<sup>6</sup> In fact, the VARA does not apply to any work made for hire. 17 U.S.C. § 101(2)(B) "work of visual art" (1994).

<sup>7</sup> 17 U.S.C. § 106A(a)(3)(A) (1994).

<sup>8</sup> 17 U.S.C. § 106A(a)(3)(B) (1994).

<sup>9</sup> 17 U.S.C. § 106A(c)(1) (1994).



public presentation are also excepted from the right of integrity.<sup>17</sup>

Both the right against modification and the right against destruction are subject to fair use,<sup>18</sup> and the VARA limits the duration of moral rights to only the life of the artist.<sup>19</sup>

In sum, the infringement of the right of integrity in the VARA conjures up the image of a person deliberately committing a physical act that results in at least a modification of a one-of-a-kind work of visual art with resulting prejudice to the actual creator's honor or reputation, where the act is unjustified in not falling within the exceptions provided for by the Act.

#### **IV. WAIVER OF THE RIGHT OF INTEGRITY VS. CONSENT**

Because of the narrow range of works covered and the limited scope of protection provided by the VARA's right of integrity, I do not believe that this right should be waivable. By "waivable," I mean the case where the artist contractually binds herself in advance against enforcement of her right of integrity. The artist should always have the right to change her mind about allowing an actual, physical alteration of the original of her work without liability for breach of contract.

I do believe, however, that the artist should be able to consent to such acts outside a binding contract. This means that the artist can always revoke her consent before the alteration of her work, but there would be no liability once the alteration has taken place. Furthermore, the artist should have to pay for any expenses incurred by the other party in reliance on the artist's consent.

This distinction between contractually binding waiver and revocable consent complies more closely with the theory of moral rights and the spirit of article 6bis of the Berne Convention. It is also practical because one can expect that the reliance risk in the case of some one who wants to alter physically the original of a work would normally be slight.

#### **V. MORAL RIGHTS THEORY AND THE BERNE CONVENTION**

Moral rights theory holds that the artist's personality is embodied in her work of art. In order for a work accurately to express the artist's creative personality, its integrity must be protected. The theory of moral rights, however, does not preclude

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<sup>17</sup> 17 U.S.C. § 106A(c) (2) (1994).

<sup>18</sup> 17 U.S.C. § 106A(a) (1994).

<sup>19</sup> 17 U.S.C. § 106A(d) (1994).

the artist's consent to a change in this expression. The concern is that the artist will be pressured by exigent circumstances to consent to a violation of her creative personality.

Although article 6bis does not prohibit waivers, it articulates this concern in the official comment which speaks of "protect[ing] the author against himself" and "stop[ping] entrepreneurs from turning the moral right into an immoral one."<sup>13</sup>

U.S. law has recognized that freedom of contract should be restricted when rights essential to the dignity of the human person are at stake. For example, no one can contractually bind herself to some one as a slave. I cannot imagine that a contract of prostitution would be enforced. Less dramatically, the Copyright Act itself precludes enforcement of agreements to waive the right of termination for fear that authors would yield to overwhelmingly superior bargaining power.<sup>14</sup>

The law cannot prevent consent to anti-personal acts, but it can refuse to make the promisor follow through on the promise. This is particularly reasonable when the injury to the promisee would normally be slight as in the VARA's right of integrity. Where significant investments would be at stake, however, economic necessity would require enforceable waivers.

## **VI. RIGHT OF ATTRIBUTION**

The waiver provision of the VARA applies not only to the right of integrity but also to the right of attribution. Under the VARA, the right of attribution consists of: (1) the right to claim authorship, including the right to remain anonymous or to use a pseudonym;<sup>15</sup> (2) the right to prevent the use of the artist's name for a work he or she did not create,<sup>16</sup> and (3) the right to prevent the use of the artist's name for a work that has been altered so as

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<sup>13</sup> World Intellectual Property Organization, Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) 42 comm. 6bis.6 (1978).

<sup>14</sup> "Termination of the grant may be effected notwithstanding any agreement to the contrary..." 17 U.S.C. § 203(a)(5) (1994).

<sup>15</sup> 17 U.S.C. § 106A(a)(1)(A) (1994). The House Report states that the right of attribution includes the "right to publish anonymously or under a pseudonym," despite the lack of explicit language in the Act. H.R. Rep. No. 514, 101st Cong., 2d Sess. 14 (1990).

<sup>16</sup> 17 U.S.C. § 106A(a)(1)(B) (1994).

to prejudice the artist's honor or reputation.

Unlike waiver of the right of integrity, the waiver of the right of attribution does not result in the actual loss of the original of a work of visual art, but it may result in perpetrating a falsehood. If the artist waives her right to claim authorship, she is permitting her work either to be attributed to no one or to be falsely attributed to another. If the artist waives the right to prevent the use of her name for a work she did not create, she is permitting the work to be falsely attributed. If the artist waives the right not to be identified as the author of an altered work, she is permitting the false impression that she is the sole author of the work.<sup>17</sup>

Thus, an element of fraud is introduced that does not exist with the waiver of the right of integrity. Any alteration to a work covered by the VARA would be visible to a third party, so there would be no fraud, absent a representation concerning the identity of the artist.

Of course, the artist will have agreed to the nonattribution, the false attribution, or the association of her name with an altered work. In the publishing business, misattribution--identifying a person as author when in fact she is not--is accepted practice and goes by the name of "ghost writing." This phenomenon also occurs in the visual arts. A Renaissance painting or sculpture, for example, is still credited to the "master" even though some of the work on it was done by apprentices in his studio. Today, however, I am informed that claiming sole credit for a painting or sculpture would be frowned upon unless the claim were literally true.<sup>18</sup>

Another difference between the effect of waiver of the right

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<sup>17</sup> 17 U.S.C. § 106A(a)(2) (1994). Note that this right may be invoked even if there has not been an infringement of the right against modification. The right against modification requires an "intentional" act, but section 106A(a)(2) presumably embraces other acts as well. This is reasonable because the artist should have the right not to be identified as the author of an altered work no matter how the alteration occurred, even though we may want to limit infringement of the right of integrity to intentional acts.

<sup>18</sup> However, it may be argued that by waiving her right not to be identified as author of the altered work she is "adopting" the alteration and is still, in a sense, author of the whole work. See *infra*, n. 19.

<sup>19</sup> Conversation with Mary Elizabeth Podles, retired Curator of Renaissance and Baroque Art, Walters Art Gallery, Baltimore, Maryland, June 19, 1995.

of integrity and the effect of waiver of the right of attribution is that waiver of the right of integrity may result in an irreversible act. If part of a metal sculpture is melted down pursuant to a waiver of the right of integrity, there may be no going back to the status quo ante. If a waiver of the right to claim authorship is invalidated, the author may begin again to be identified as the creator of the work.

Market concerns may also loom larger in the right of attribution. It is not too farfetched that the commercial success of a work might depend on the artist not revealing her identity. A gallery owner might agree to market the works of an artistically talented convict only on condition that the artist forswears the use of her own name. The gallery owner might very well consider it too risky to proceed on the basis of the artist's revocable consent.

Thus, I would support binding waiver of the right to claim authorship where the waiver was as express and as specific as required by section 106A(e) and only where the work is anonymous or a pseudonym is used. This compromise of moral rights principles is justified in the expectation that more artistic creativity would result, although I would be willing to revise my opinion if the Copyright Office Report disproves this hypothesis.

I do not believe, however, that the VARA ought to facilitate attributing a work of visual art to an artist who did not create it. Unlike ghost writing in the publishing industry, such a practice is not accepted in the realm of the arts with which the VARA is concerned. Perhaps the Copyright Office Report will confirm this view.

Finally, I would allow an artist to waive her right not to be identified as the author of an altered work if she has consented to the alteration, that is, once the alteration has occurred. This is consistent with my position on the non-waiver of the right against modification. The artist may bind herself in advance to continue to be identified as the author of the altered work, although she can prevent the alterations from occurring by revoking her consent up to the moment before they occur. Thus, consent to the alteration becomes a condition precedent to the enforcement of the waiver of the right of attribution.

## **VII. JOINT WORKS**

The VARA provision allowing one joint author to waive all moral rights for all other joint authors is completely contrary to the theory of moral rights. It is also inconsistent with the VARA's prohibition of the transfer of moral rights. In effect, the VARA says that the exercise of moral rights is so intensely personal that only the author can vindicate them, yet some one completely unrelated to the author can waive them, possibly

subjecting her work to irreparable alteration. One joint author by waiving the right to prevent attribution in the case of alteration, can force another joint author to be identified as an author of an altered work. Indeed, one joint author can allow the work to be destroyed!

The results of this provision are so anti-personal that they cannot be outweighed by the benefits to be gained by ease in obtaining waivers, especially when we are talking about the permanent alteration or destruction of originals.

In the case of the right of integrity, the consent of every joint author must be obtained. In the case of the right of attribution, waivers must be obtained from each joint author whose right of attribution would be affected.

### VIII. SUMMARY

The narrow range of works covered by the VARA and the limited scope of the rights recognized by the VARA must always be borne in mind in assessing its waiver provisions. In the case of the right of integrity, for the most part we are talking about irreversible physical acts performed on originals of paintings, sculpture, drawings, and photographs. Because of this narrow focus, the conclusions that I have drawn can have no precedential value for other kinds of works and rights.

We should approach with skepticism waivers of moral rights that permit the destruction or irreversible physical changes of originals and that result in nonattribution and misattribution. We should begin with the assumption that most artists would not agree to such acts in the context of roughly equal bargaining power, but, as personal rights, we must recognize that some artists may freely consent.

We must also recognize that waivers of moral rights might so increase artistic productivity as to be worth the trade off. The Copyright Office study should provide valuable data on these assumptions and calculations.

Interpretation of the data, however, may be difficult. Scant evidence of waivers need not lead to the conclusion that the waiver provision should stay because artists are not being coerced. It may mean that knowledge of the provision has not yet reached the favored parties. It may also mean that moral rights do not significantly inhibit the art market; therefore, the waiver provision should be repealed. This latter conclusion is more consistent with moral rights theory.

Considering the data that are available now, the theory of moral rights, the value of freedom of contract, the bargaining power of most artists in the visual arts covered by the VARA, and

the practicalities of the art market, I have come to the following preliminary conclusions regarding the waiver of the moral rights provided in the VARA for the works covered by the VARA:

**1. Right of Integrity**

The right of integrity should not be subject to a contractually binding waiver, but the artist may consent to infringements of the right. This means that the artist may revoke her consent at any time prior to the act of infringement as long as she reimburses the other party for reliance expenses.

**2. Right of Attribution**

The right to claim authorship should be subject to a contractually binding waiver as express and as specific as required by the VARA and only where the work is anonymous or a pseudonym is used.

The right to prevent the use of the author's name as author of a work which he or she did not create should not be subject to a contractually binding waiver.

The right to prevent the use of the author's name as author of a work that has been altered should be subject to a contractually binding waiver subject to the author's consent to the alteration:

**3. Joint Works**

In the case of the right of integrity, the consent (or waiver under current law) of every joint author must be obtained. In the case of the right of attribution, waivers must be obtained from each joint author whose right of attribution would be affected.

I commend the Copyright Office for its diligence and thoroughness in carrying out the mandate of Congress in a time of budgetary constraints. I look forward to studying the final report.

Thank you.

LAW OFFICES  
MORSE, ALTMAN, DACEY & BENSON  
73 TREMONT STREET  
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TEL 617 524-1818  
FAX 617 524-1822

GENERAL COUNSEL  
OF COPYRIGHT

June 23, 1995

JUN

Via Fax (202) 707-8366

Marilyn Kretsinger, Acting General Counsel  
VARA Waiver Study  
Copyright GC/I & R  
P.O. Box 70400  
Southwest Station  
Washington, D.C. 20024

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CONTINUATION

Dear Marilyn:

Enclosed is a typewritten copy of the testimony I presented at the waiver study hearing on June 21, 1995. The day was most enjoyable and I am pleased to have had the opportunity to participate. As I mentioned, I look forward to reading the final report and would be happy, if it is appropriate, to brainstorm further with you as to the possible conclusions and solutions as you prepare the draft of the report.

Sincerely,  
MORSE, ALTMAN, DACEY & BENSON

Deborah L. Benson

DLB/bac  
Enclosure

cc: Marybeth Peters, Register of Copyrights  
Jennifer Hall, Office of General Council  
Molly Sherden, Acting President VLA of MA  
Carolyn Rosenthal, Executive Director VLA of MA

|                |
|----------------|
| Comment Letter |
| RM 95-58       |
| No. 3          |

GENERAL COUNSEL  
OF COPYRIGHT

JUN 23 1995

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Testimony of Deborah L. Benson  
Morse, Altman, Dacey & Benson  
Trustee, Volunteer Lawyers for the Arts of  
Massachusetts, Inc.  
VARA Hearing Panelist - June 21, 1995

Let me briefly introduce myself. My name is Deborah Benson. I have practiced law for thirteen years at Morse, Altman, Dacey & Benson an intellectual property firm in Boston Massachusetts.

In the course of my practice, I have counseled clients on the acquisition, protection, license and sale of proprietary rights of all types including copyrights, trademarks, and trade secrets.

My relevant clients have included publishers, authors, graphic design firms, graphic designers, advertising agencies, illustrators and artists including New York artists Jeffrey Schiff and Stephen Antonakas who have both received numerous public commissions.

Approximately 6 years ago, I founded the Volunteer Lawyers for the Arts of Massachusetts, a joint project of the Boston Bar Association, the City of Boston Mayor's Office of Cultural Affairs and The Artists Foundation. VLA of Massachusetts, like most VLAs, provides pro bono legal assistance to artists and arts organizations meeting certain financial criteria. VLA also educates both the arts and legal communities about legal issues affecting artists. Although my comments are largely my personal views, I would like to thank you for inviting me and the VLA of MA to speak at this hearing.

In my experience, it is clear that the waiver provisions effectively negate the protections of the Visual Artists Rights Act of 1990 due to the disparate bargaining power of artists; the limited opportunities for commissions, especially public commissions of sculptural works, works affixed to buildings and site specific artwork where waivers are most likely to be sought; and because buyers do not want to violate the law and will, therefore, draft contract language which is consistent with the law and no greater.



Therefore, the law must be as strict as it can be or it is meaningless.

Because VARA is only a few years old, we have observed that the relevant community remains largely unaware of its provisions. In 1992, VLA of Massachusetts, as a means of providing the Copyright Office with meaningful artist input in response to the Office's request for information for its interim report to Congress on the subject of moral rights waivers, prepared and conducted a survey of Massachusetts artists. The survey tracked the questions presented by the Copyright Office in its request for public comment. We obtained data from twenty-two artists, all well-established, working artists with local and regional reputations, over half having done commissioned work within two years of the survey, and most represented by dealers, galleries and agents. Of these artists, only approximately 30% were aware of the provisions of VARA at the time of our initial survey.

We are pleased and honored that the Copyright Office chose to model its survey questionnaire on the survey prepared by VLA of Massachusetts. In 1995, approximately 3 years later, we can report that about half of the artists surveyed by VLA of Massachusetts knew of the existence of moral rights in works of visual art in the United States. While this is an increase of about 20% over our prior survey, conversely our statistics reveal that at least half of this community remains unaware of its rights.

In view of this, there is limited opportunity to document fully the effect or likely effect of the waiver provisions at this time. Additionally, our survey confirmed that many noncommissioned works of art are sold without a written agreement. Yet some evidence of the tendency, especially on the part of commissioning parties, to seek and obtain insurance provisions in commission contracts which will, whether or not such provisions are exercised, enable them to avoid violating the law is beginning to emerge. Additionally, we can look to pre-VARA contracts executed in states with artists rights acts as evidence of this intent on the part of buyers or commissioning parties.

As a practical matter, a buyer or commissioning party, especially one commissioning artwork for a public building, wants to be able to remove the work should it choose to or need to, even if the removal will result in the destruction of the artwork. We know at least one court (in Carter v. Helmsley-Spear, Inc.) has established a relatively low threshold for qualifying a work of visual art as a work of recognized stature, therefore, removal which results in destruction of the work will, in most cases, violate the artist's rights of integrity under VARA. Occasionally a contract may provide that the artist will be consulted with regard to the removal of the work. Notwithstanding such provisions, however, disputes will generally be resolved contractually in favor of the commissioning party. A 1986 Art Commission Contract with the Municipality of Metropolitan Seattle for the Downtown Seattle Transit Project provides a typical example of this type of contract provision. This contract provides in part that:

The commissioning party agrees that it shall not damage, alter, modify, change or substantially relocate the work of the Artist without first conferring with the Artist and obtaining the prior written approval of the Artist to the proposed modification, change or substantial relocation.

The contract goes on to state that notwithstanding the Artist's refusal to provide (or the commissioning party's failure for any reason to otherwise obtain) the Artist's written approval as provided for in the contract, the commissioning party, in its sole discretion, shall have the right to remove the work of art. In the event that the commissioning party shall decide to remove the work of art, the Artist shall have the first right of refusal to purchase his or her artwork, but only provided it stands alone, is not integrated into a larger piece, and can be removed without expense to the commissioning party.

Nothing in this contract prevents the removal of the work by the commissioning party, even if the removal results in the alteration, modification or even the complete destruction of the artwork. This type of language in a commission agreement today would operate as a waiver. It is also a good example of the commissioning party's intent to

control when and for how long the artwork will remain in its building.

Likewise, in Massachusetts, contracts between artists and the Massachusetts Bay Transportation Authority for its "Arts-on-the Line" program, a program which helped set national standards for incorporating art into mass transit facilities, and on which the Seattle program was modeled, provide that the MBTA has the right to remove the work of art from display and, if the work can not be moved without mutilation or destruction, the Artist has the right to remove such elements of the artwork as may be salvaged without damage to the property. Most of the Arts-on-the Line contracts are pre-VARA and they track, to some extent, the language of the Massachusetts Art Preservation Act, which provides that moral rights in a work of fine art which can not be removed from a building without substantial physical defacement, mutilation, alteration or destruction of the work are "automatically waived" unless expressly reserved in a recorded instrument. Contract provisions such as those found in the MBTA contracts corroborate the position that commissioning parties do not intend to provide the artist with any greater rights than the governing law requires.

The artists with whom I have worked and who have received these public or municipal commissions unanimously attest that the piece of public art they are commissioned to create is always created specifically for the space in which it will be installed and its removal usually results in the destruction of the work as it was designed to appear. As a practical matter, government commissions do not afford an opportunity for the artist and the contracting state, municipality or agency to discuss and negotiate the future of the artwork in the context of the space or elsewhere, including its possible removal for whatever reason, including for example if the building is to be torn down, if the public dislikes the work, or if the work is unsafe or creates a public hazard or nuisance. Nor is there an opportunity, even if the artist is represented by an attorney during the contract negotiations, to draft contract language which is specifically designed to provide for these contingencies. The contract vests all rights and decisions

with regard to the removal of the work with the commissioning party. Generally, the contract is a pre-written form and there is no negotiation over the language if the artist, even an established artist, wants the commission.

I have found other examples of waivers in more recent mass transit and public art commission contracts. A 1994 contract for a temporary installation with the Massachusetts Highway Department for the Central Artery Tunnel Project, the largest highway construction project in the country, provides that the Artist specifically recognize that the artwork, which consisted of 50 "removable" panels, was "temporary," therefore, the contract provided that the Highway Dept. was entitled to "destroy" the artwork.

The most sweeping waiver language can be found in a 1994 commission agreement with the Los Angeles County Metropolitan Transportation Authority. This contract provides that, at the sole discretion of the Los Angeles Authority, the artwork may be moved even though such removal may subject the work to physical defacement, mutilation, alteration, distortion or destruction or other modification. The contract goes on to state that the Artist specifically agrees to waive any rights which the artist may have under the California Art Preservation Act or under VARA. While this language may not meet the technical requirements of VARA, because it is arguably overbroad, it clearly documents the commissioning parties intent to require the artist to give up his or her moral rights and to insure against a claim for violation of these rights. It is also interesting to note that California, the only state with a resale royalty law, and a state which holds itself out as having many various laws favoring artists, also required the artist in this contract to both limit and waive his resale royalty rights as well.

In none of the foregoing examples I have mentioned are the waivers limited as to duration.

You have also asked us to comment on whether there are proportionately more waivers given for artistic works included in buildings than for other types of works. Let me

answer this by saying that, if this is so, it may be merely the result of the extremely narrow scope of the "artworks" to which VARA applies. For instance, the Massachusetts Statute extends moral rights to a wider range of "works of art" including film, craft objects, and other works of recognized quality. This protection is not preempted, because the preemption provisions of VARA extend only to legal and equitable rights which are equivalent to any of the rights of 106A. Like VARA, the Massachusetts Statute provides that the artist's moral rights may be waived in a written instrument which identifies the work to which the waiver applies. As an attorney representing buyers of art, I have personally drafted many commission contracts under Massachusetts law, especially for publishers, film makers, advertising and graphic arts firms. These contracts frequently included provisions for waivers of moral rights. The specific intent of these waivers is to enable the publisher or other commissioning party to crop, adapt or edit the work for its use. The general intent of the waiver is to avoid any possibility of conflict with the 1987 State Statute under which there have been only 3 cases, all unreported. No additional compensation is ever given to the artist for the waiver, nor would the purchaser expect to pay more to obtain a waiver. Additionally, you should know that waiver language is beginning to appear in legal treatises and form books directed to this industry. One example of a broad, general waiver can be found in the model contract form at Appendix 4 of The Publishing Law Handbook, published by Prentice Hall Law & Business.

In sum, it is apparent that artists' moral rights are routinely written out of their contracts. Therefore, to give any meaning to VARA's provisions protecting artists rights in the integrity of their artwork, it is necessary to tighten the protections afforded to artists in order to prevent the wholesale (and generally nonnegotiable) waiver of these rights. However, as Mr. Edelson has stated earlier, the tightening of these provisions precluding waivers in the context of commissioned works could have a chilling effect on the commission of works of art and this Office and Congress will have the difficult task of determining the primary intent of the law in this area. If, as Ms. Peters has stated, the intent is to "grant the

right'' then the waiver provision must be, if not outright repealed, then extremely narrowed.

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711 E Street NE, Washington, DC 20002  
Dr. Carol Pulin, Director, 202-544-2439

July 1, 1995

Jennifer Hall  
Copyright Office GC/I&R  
PO Box 70400  
Southwest Station  
Washington DC 20024

GENERAL COUNSEL  
OF COPYRIGHT

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Dear Jennifer,

Sorry it has taken me so long even to send you this transcript of my testimony at last week's hearing. I have not had time to find out whether or not Frank Stella granted a waiver for the use of his print on the cover of that catalogue, but will try to do so before your deadline for comments on July 31. In any case, the demonstration holds: the designer's cover gives a very different impression of the print than the whole and the audience for the catalogue has no way to know if the artist even knows, let alone approves, of the modifications to his image.

Any chance of getting a transcription of the other testimony that I could not stay to hear? If so, please let me know. I'd like to come in and read through it, in case there are other good points that I should mention in an article for the Fall issue of our journal (my closing date in is early August).

Thanks again for making it easy for me to take part in the proceedings. Please don't hesitate to call if there is anything else I can do to help the Copyright Office efforts.

Sincerely,

*Carol Pulin*

|                |
|----------------|
| Comment Letter |
| RM 95-         |
| No. <u>4</u>   |

**PRINT  
ALLIANCE**711 E Street NE, Washington, DC 20002  
Dr. Carol Pulin, Director, 202-544-2439

Testimony presented at the US Copyright Office hearing on waiver of moral rights under the Visual Artists Rights Act, Wednesday, June 21, 1995, 10:00 am, at the Library of Congress:

I am Carol Pulin, Director of the American Print Alliance and formerly Curator of Fine Prints here at the Library of Congress. I earned my PhD in art history and criticism from the University of Texas at Austin. Thank you for the opportunity to present some information and offer suggestions about aspects of the waiver of moral rights under the Visual Artists Rights Act of 1990.

The American Print Alliance is a 501(c)(3) non-profit consortium of printmakers' councils in the United States and Canada. We represent about 3,000 artists who are members of our ten councils. Our journal, *Contemporary Impressions*, publishes critical literature about prints and related arts, like paperworks and artists' books; besides artists, it reaches collectors, curators in museums and universities, fine arts publishers, gallery owners and others in the art world.

Printmakers seem to think that they suffer disproportionately, compared to the other visual arts, from copyright infringements and VARA moral rights infringements. It's easy to understand why. In the past, it was common for prints to be traced and for unauthorized copies of an artist's image to be printed from



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woodblocks cut using the tracing. A recent exhibition of old master prints at the National Gallery of Art highlighted that kind of borrowing, and followed historical convention in politely labeling the new prints as "reverse copies." Today, thanks to advances in photocopying and electronic scanning, it is even easier to copy images from a piece of paper and reprint them in ways not intended by the original artist. It also seems to be psychologically easy, because the miscreants -- like the general public -- often think (or want to think) of prints as reproductions anyway, as if the fact of being multiples makes them less original, or less protected by copyright and VARA, or less valuable to the artist. While many cases of borrowing are simple copyright infringement, increasingly they are also examples of VARA rights infringement, because the borrower can so easily modify the image before reprinting it -- with or without the original artist's name. In cases in which the artist did not give permission for the copy at all, he or she also, obviously, did not waive VARA rights. Even in cases in which artists gave permission for their works to be reproduced, as illustration for a catalogue or on a poster, for example, artists tell me that they are increasingly surprised -- not pleasantly -- to find that their images have been modified.

In both of these types of cases, i.e. whether or not the artists have granted copyright permission for a reproduction, the artists have not been asked to waive their VARA rights of attribution and

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integrity. Most of the artists do not know that these are VARA rights, and so they rail about the lack of 'copyright protection' and (mistakenly) see issues of integrity in the same light. The most frequent examples of modification I hear about are overprinting and cropping. With or without copyright permission, it is an infringement of the artist's VARA rights to print the title of a catalogue across the image of that artist's work reproduced on the cover, or to use only a detail rather than the entire image. Even when it is clear that copyright permission has been granted by the artist, as a curator and arts administrator, I am still unable to discern whether or not an artist has granted a waiver of VARA rights.

I think it is notable that when I asked artists for specific examples, they were quite willing to tell me about them but were unwilling to grant permission to show them at these hearings. The artists explained that once it became known that they were not prosecuting cases of infringement (of copyright and/or VARA rights), that designers and advertising artists would appropriate their images even more often.

Yet the artists felt that they could not afford to prosecute for two reasons. The first is economic: artists cannot file in small claims court for damages for VARA infringements, and few artists can afford the legal representation that might win a civil suit against a publisher or advertising agency. Second is the fear of

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retaliation: the artists are afraid that, if their complaints are anything more than a request that this not be done again, their images would not be selected for reproduction at all, losing the publicity needed to attract collectors to buy the original works. And I have heard of some cases in which artists, whether asked if they minded the overprinting of a cover title or finding out that this was a feature of the design, protested; in every case that I know about, the artist was given the option of withdrawing the protest or having some other artist's work chosen for that cover. In addition, artists who are not well known frequently said that they are at a distinct disadvantage compared to famous artists, because commercial artists know that they would get in trouble for changing an image identified as by Jasper Johns or Jennifer Bartlett or Robert Rauschenberg, for example, but otherwise seem to think that they know as much as the artist about what would be the best proportions for an image or whether it would be "stronger" to show a detail or perhaps just the central figure.

I offer two suggestions. Neither will completely solve the issue of commercial artists or publishers or advertising agencies purposely appropriating and changing an image without a waiver of VARA rights on the assumption that they will not be caught and/or not be prosecuted. However, the suggestions may help limit such occurrences, so that the artist more often enjoys those rights which are supposed to be protected by this Act.

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The first suggestion is education. The recently completed survey conducted by the Copyright Office is certainly a start, but short articles in plain English (and Spanish and other languages widely spoken in the United States) could be placed in the arts sections of newspapers all across the country. The places where people read art reviews, notices of exhibitions, etc., are the places where this information would reach a target audience. A simple information sheet about copyright and VARA could be distributed to professors who teach fine arts classes at colleges, universities and art schools, with permission to copy and distribute it to all their BFA and MFA students -- and to their colleagues. At least as important as educating the artists about their rights is educating the people usually responsible for violating VARA rights; most often those are commercial artists and designers, advertising agencies, and publishers. To reach them, I would suggest articles and notices in design newsletters and their professional organization newsletters as well as distribution of that information sheet to applied art departments in schools. And, although there may be some resistance from the manufacturers and distributors, it would be very useful to be able to enclose an information sheet with each computer software package that is likely to be used for modifications of pre-existing images (e.g. Photoshop and Matisse) and even with disks of images which are sold "copyright free" -- to point out that VARA rights exist.

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My second suggestion is to require, or at least make it a standard convention, to indicate when an artist has given a VARA waiver, much as we now indicate when an image is protected by copyright. It would soon become quite noticeable when that waiver has not been obtained, and would at least add some pressure towards compliance with the law. Perhaps I am an idealist, but I think that the public is fairly astute and, once they know about the arrogance of those designers who modify an artist's image, they will help to control misuse.

Thank you.

NATIONAL ENDOWMENT FOR THE ARTS

Page 1 of 5

31 July 1995 VIA FACSIMILE

GENERAL COUNSEL OF COPYRIGHT

JUL 31 1995

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The Federal agency that supports the visual, literary and performing arts to benefit all Americans

Ms. Marilyn J. Kretsinger Acting General Counsel Library of Congress Washington, DC 20540

Dear Ms. Kretsinger:

This letter is responsive to your correspondence of May 8 and May 23, 1995 to Mr. Michael Fabian, Assistant Director of Visual Arts Program, National Endowment for the Arts.

The National Endowment for the Arts (Arts Endowment) would like to express its position on the waiver of moral rights provision in the Visual Artists Rights Act of 1990 (VARA). A copy of the NEA's position is attached.

We applaud the efforts of the Copyright Office to continue to research this undeveloped area of copyright law. If we can be of further assistance, please do not hesitate to contact us.

Respectfully submitted,

[Signature]

Ms. Laura M. Brinkman Office of General Counsel

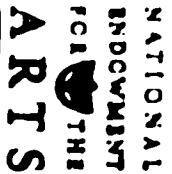
: 1mb attachment

- Arts in Education
Challenge & Advancement
Dance
Design Arts
Folk & Traditional Arts
International
Literature
Local Arts Agencies
Media Arts
Museum
Music
Opera/Ballet/Theater
Preserving & Commemorating
State & Regional
Theater
Visual Arts

Comment Letter
RM 95-50
No. 5

Hope O'Keefe

The Henry M. Stanley Center 1100 Pennsylvania Ave., NW Washington, DC 20004 202-696-6400



**STATEMENT OF  
THE NATIONAL ENDOWMENT FOR THE ARTS  
ON THE VISUAL ARTISTS RIGHTS ACT OF 1990**

**STATEMENT OF INTEREST**

The Federal agency that supports the visual, literary and performing arts is proud of all Americans

The National Endowment for the Arts, an independent agency of the Federal government, was created by Congress in 1965 to encourage and support American arts and artists. It does its work by providing grants to nonprofit arts organizations and to artists of exceptional talent in all fields, as well as through its own leadership activities.

- Arts as Education
- Challenge & Adventure
- Dance
- Design Arts
- Expository Arts
- Film & Traditional Arts
- International
- Literature
- Local Arts Agencies
- Media Arts
- Museum
- Music
- Opera/Classical Theater
- Preserving & Commemorating
- Scenes & Regional Theater
- Visual Arts

The Endowment promotes the continued vitality and excellence of the arts throughout the United States. It recognizes artists and appreciation of all the arts. It endeavors to support arts activities of merit, to promote the overall financial stability of arts organizations, and to make the arts available to all Americans.

**STATEMENT OF POSITION**

- Visual Arts
- Museum
- Music
- Opera/Classical Theater
- Preserving & Commemorating
- Scenes & Regional Theater
- Visual Arts

The National Endowment for the Arts (Arts Endowment) strongly supports the recognition of the moral rights of artists provided in the Visual Artists Rights Act of 1990 (VARA). VARA holds the promise of recognizing the rights of American artists into parity with the long-recognized moral rights of artists internationally.

For works defined as a "work of visual art" in 17 U.S.C. 101, VARA recognizes two moral rights of the artist: the right to attribution - the right to claim or disclaim authorship of a work - and the right to integrity - the right to prevent distortion, mutilation, or other modification of an artist's work. VARA further provides that these rights may not be transferred. While moral rights may be waived, the waiver must be in writing and must specifically identify the work of art and the uses for which the waiver applies. A waiver by one coauthor of a work of joint authorship constitutes a waiver by all authors. Blanket waivers are prohibited.

The Arts Endowment believes that moral rights under VARA should be strengthened in three ways: by expanded education regarding moral rights; by a strengthened waiver provision; and by expanding the moral rights recognized under VARA.

The Henry Healy Center  
480 Pennsylvania Ave., NW  
Washington, DC 20003  
202-646-4400

**Expanded Education Regarding Moral Rights**

The focus of the Copyright Office's hearing on the effect of VABA's waiver provision is somewhat ironic. As the Interim Report of the Register of Copyrights and the Copyright Office's recent survey demonstrate, most artists are unaware of VABA and their rights to attribution and integrity. As a result, these rights are, for all practical purposes, irrelevant to all but the most sophisticated transactions. Artwork is distributed, altered, or destroyed every day without any recourse because the artists in question are simply unaware that they have any legal rights to protect the integrity and proper attribution of their work. VABA's carefully structured waiver provision is rendered moot because artists, in effect, "waive" these rights by never asserting them.

Artists must be aware of their rights before they can intelligently waive them. Accordingly, the Arts Endowment recommends that the Copyright Office conduct an education campaign to inform artists, art purchasers and the general public of specific rights under VABA. The campaign should be structured in the same way that the Copyright Office conducts education campaigns regarding other copyright issues.

**Dissemination Waiver Provisions**

The Arts Endowment believes that the inclusion of a provision in VABA allowing commercial waivers of moral rights is appropriate. Artists ought to be able to contract freely. However, the Endowment believes that inclusion of a provision waiving the right to integrity in a contract for artwork is generally inappropriate and should be disallowed unless the work is nonmovable -- for example, a mural or large fixed sculpture. There would rarely be any justification for the alteration or destruction of a more portable work such as a painting or small sculpture. If disallowed, an Owner may simply sell or reuse the work to the artist. And even with respect to nonmovable works, any waiver of the right to attribution would appear inappropriate.

Even when a waiver provision may be appropriate, the waiver provision must be strictly construed and enforced and its effect carefully monitored to adequately protect moral rights. Because litigation is costly and artists may fear being denied commissions in the future, artists may be reluctant to enforce VABA rights. Any agreement to waive an artist's important moral rights should be entered into with adequate information regarding the nature of those rights and the meaning of a waiver, with equality of bargaining power, and with adequate compensation to the artist.

First, it is imperative to the preservation and protection of moral rights that both the artist and the purchaser be aware of those rights. Any waiver provision should include a full description of the rights that are being waived. Thus, for example, the contract should not provide simply "Artist waives all rights under the Visual Artists Rights Act." The preferred alternative would be: "Artist waives her/his rights under the Visual Artists Rights Act, including the legal rights to claim or disclaim authorship of the work and the right to prevent distortion, modification or other modification of the work." We recognize that many artists do not use written agreements; oral



Agreements are the most commonly used form of contract in transactions involving artists. It is the Arts Endowment's position that an oral waiver of moral rights should not be effective under VADLA. It is imperative to emphasize the importance of the written agreement, especially in instances where it is unclear whether a right has been violated.

Second, the waiver provision must not negate the protection that the Act provides by creating or institutionalizing disparate bargaining power between the parties. Many artists are in a vulnerable position throughout the bargaining process because of financial pressures. They should not be coerced into waiving their rights in a condition to a contract solely because of the desire to sell work. Contracts for the sale of works of visual art must be more than contracts of adhesion. Waiver of moral rights should be in exchange for specific compensation, separate from the compensation given for the work itself. In addition, where the work is slated for destruction, the artist should be given the opportunity to preserve the work.

The Arts Endowment proposes that waiver provisions should be revised to require four additional elements:

- a specific description of the rights proposed for waiver;
- adequate notice (at least sixty days) to the artist of any proposed modification, removal, or destruction of the work (parallel to the VADLA provisions for works attached to or incorporated in buildings, 17 U.S.C. § 113K(4));
- a reasonable opportunity for the artist to preserve any work slated for destruction; and
- specific additional compensation both for the inclusion of the waiver provision in the contract and for the waiver in the event of actual modification, removal or destruction of the work.

With respect to works of joint authorship, the current waiver provision should be changed to require consent by all joint authors for a waiver. The provision, which states that waiver by one coauthor is a waiver by all authors, runs contrary to the core of VADLA.

**Expanded Moral Rights Under Visual Artists Rights Act**

The Arts Endowment believes that the moral rights of artists under the Visual Artists Rights Act should be expanded.

First, the definition of works covered by the Act should be expanded to include all visual arts media and to eliminate the somewhat hazy notion upon which it currently rests. Currently, the definition of visual art is limited to a painting, drawing, print, sculpture or photographic image produced for exhibition purposes only, existing in a single copy, in a limited edition of 200 copies or fewer. This definition is too restrictive.

Second, the term for the retention of moral rights should be granted parity with the term of copyright. Under current law, moral rights expire upon the death of the artist. These moral rights are the artist's major legacy and should not vanish upon the artist's death. Just as an artist's heirs have the continuing right to royalties and licensing income, they also should have the right to protect the integrity and proper attribution of the artist's work. The moral rights should extend at least fifty years beyond the death of the artist, coinciding with the rights of authors.

Third, it should be made clear that the right to integrity generally includes the right to complete a work. The Arts Endowment respectfully disagrees with the interpretation of VADLA by the United States District Court for the Southern District of New York in *Carroll v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y. 1994), which explained the artist's right to withhold the work, also known as the right of divulgation. This is the artist's absolute right to decide when and whether a work is complete and when or whether to show it to the public. See John Heryman and Albert Elms, *Law, Ethics and the Visual Arts*. Congress, by statute, or the Copyright Office, by regulation, should define the right to integrity to clearly include the right to complete a work and the right of divulgation.

Finally, the Arts Endowment strongly supports the examination of the experience under state moral rights provisions that provide more extensive protection of artists than does VADLA. For example, the Arts Endowment strongly encourages the Copyright Office to re-examine the effect of the statutory protections afforded artists under New York and California law, including California's resale royalty provisions. These programs can serve as a model for the full reorganization of moral rights by the Federal government. As the Copyright Office's previous study indicated, in order to avoid presumption, any further extension of moral rights should be enacted at the Federal level.



The National Endowment for the Arts appreciates the opportunity to comment on these vitally important issues, and applauds the efforts of the Copyright Office in its continued focus on the development of this critical area of copyright law and practice.

A R S

ARTISTS RIGHTS SOCIETY

August 7, 1995

Ms. Marilyn J. Kretzinger, Esq.  
Acting General Counsel  
Copyright Office  
P.O. Box 70400 Southwest Station  
Washington, D.C. 20024  
FAX: 202-707-8366 (2 Pages)

|                |
|----------------|
| Comment Letter |
| RM 95-50       |
| No. 6          |

Dear Ms. Kretzinger,

In reply to Jennifer Hall's request, I am attaching ARS' written objections to VARA and its waiver of moral rights provision.

Please do not hesitate to call if you have any question. In the interim, kindly accept my best wishes,

Sincerely,

*Ted Feder*

Dr. Theodore H. Feder  
President

GENERAL COUNSEL  
OF COPYRIGHT

AUG 8 1995

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# A R S

Artist Rights Society

Dear Ms. Krutinger:

At first blush, VARA grants artists two distinct rights not previously provided by U.S. federal law, but available in certain states such as California, New York, and Massachusetts. These are the rights of attribution and the rights of artistic integrity. Although the passage of VARA was a step in the right direction, it falls far short of having envisioned by Berne, and may in fact be a back-handed way of appearing to comply with Berne's moral rights provisions while substantially failing to do so. In our view, the three most glaring failures of the law are the following:

1) The rights conferred endure only during the life of the author, and expire upon his or her death. They may only be claimed by the author during his lifetime and are not descendable. This contradicts Article 6 Bis (2) of Berne which requires the rights of integrity and attribution to be maintained at least until the expiry of economic rights. However, VARA would not appear to preempt state law where such state law permits for post-mortem compliances.

2) Another grave drawback is that under Article 3.D the rights conferred apply only to works of visual art created on or after June 1, 1991. They therefore do not apply to works made before that date, unless the artist retained title to the work, and has not previously conveyed it to another party by gift or sale. Thus once again, the dubious rule of non-retroactivity excludes almost all works made before the effective date of the law, even if mutilation or destruction of the work occurs after June 1, 1991. Consequently, works made before June 1, 1991, (with the exception of those which have never been conveyed by the artist to another party) remain forever unprotected. The shockingly explicit words of the act are that it "shall not apply to any destruction, distortion, mutilation, or other modification of any work which was made before such effective date." (Sec. 610 (2))

3) Finally, the law does not cover printed or broadcast reproductions of the works, thus including distortions which may appear in magazines, books, or television.

With regard to VARA's provisions for the waiver of moral rights, in our view this further weakens an already flawed and deficient Visual Rights Act. With the exception of a handful of well known and economically secure artists, the disproportionate bargaining power of the artist and the would-be buyer, gallery, or museum, interested in his or her work, is such that the artist will frequently feel obliged to waive moral rights whenever this is made a precondition of purchase. The only way to safeguard against such a contingency is to remove the waiver provision as an option, and in effect to make such rights non-waivable and inalienable.

Sincerely,



Dr. Theodore H. Feder  
President

Part IX - Summary Transcript of Public Hearing

## **SUMMARY OF PUBLIC HEARING**

### **On the Effect of the Waiver of Moral Rights Provisions of the Visual Artists Rights Act of 1990**

**June 21, 1995**

**Room 414, James Madison Memorial Building  
Library of Congress, Washington, D.C.**

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**Register of Copyrights Marybeth Peters** welcomed the VARA hearing participants and members of the public, and introduced Copyright Office staff involved in the VARA study: **Marilyn Kretsinger, Acting General Counsel; Charlotte Douglass, Acting Policy Planning Advisor; Patricia Sinn, Senior Attorney; and Jennifer Hall, Attorney-Advisor.** She also introduced interns **Greg Miller, Allyson Block and Bruce Haraguchi.**

**The Register** briefly discussed the background and parameters of the hearing. She explained that when Congress passed the Visual Artists Rights Act of 1990, a key issue was whether the moral rights of attribution and integrity could be waived. Congress approved legislation that allowed waiver but required the Copyright Office to report later whether waivers were being automatically obtained due to artists' unequal bargaining power. **The Register** set out two purposes of the hearing: 1) to obtain "more concrete evidence on the waiver provisions and how they are working," and 2) to determine "whether or not there is a viable right and what problems there may be because of the imbalance in the economic bargaining power between the parties." Due to the number of witnesses, oral remarks would be restricted to ten minutes, but the Office would provide ample time for submission of written comments, which the Register

encouraged. The hearing would be comprised of four panels, with flexibility to accommodate late witnesses.

**Panel 1:**     **Rockne Krebs**, Vice President of the National Artists' Rights Equity Association  
                  **Carol Pulin**, Director of the American Print Alliance  
                  **Gilbert Edelson**, Administrative Vice President and Counsel of the Art Dealers' Association

**Carol Pulin, Director, American Print Alliance**

Pulin, formerly Curator of Fine Prints, Library of Congress, earned her doctorate in art history and criticism from the University of Texas at Austin. American Print Alliance is a 501(c)(3) nonprofit consortium of printmakers' councils in the United States and Canada that represents "about three thousand artists who are members of our ten member councils," she said. The Alliance produces Contemporary Impressions, a journal of critical literature about prints and related arts.

"Printmakers seem to think they suffer disproportionately, compared to other visual artists, from copyright infringements and VARA moral rights infringements," explained Pulin. In the past prints were often traced and made into copies without the artist's consent. She noted that the National Gallery of Art recently "highlighted that kind of borrowing" in their exhibit of old master prints and "following historical convention, they politely labeled the new prints as 'reverse copies.'" Modern advances in "photocopying and electronic scanning" have added to the ease with which copies can be made and reprinted. Pulin explained that the general public often thinks of prints as reproductions and views them as less protectable works of art.

Borrowing often results in VARA rights infringements, Pulin said, because "the borrower can so easily modify the image before reprinting it -- with or without the original artist's name."

Where artists give permission to reproduce a work in a catalogue, the images often end up modified. Because artists do not understand and have not been asked to waive their VARA rights of attribution and integrity, "they rail about the lack of 'copyright protection' and mistakenly see issues of integrity in the same light."

**Pulin explained that "overprinting and cropping" are common VARA infringements. "With or without copyright permission, it is an infringement of the artist's VARA rights to print the title of a catalogue across the image of that artist's work reproduced on the cover, or to use only a detail rather than the entire image." She noted that "[e]ven when it is clear that copyright permission has been granted by the artist, as a curator and arts administrator," she is "still unable to discern whether or not an artist has granted a waiver of VARA rights."**

**Pulin noted that artists would relate experiences with VARA violations in confidence, but would not let her show examples of those violations at the VARA hearing. Artists feared that "once it became known that they were not prosecuting cases of infringement [of copyright and/or VARA], that designers and advertising artists would appropriate their images even more often."**

**Artists do not wish to prosecute for two reasons: economics and fear of retaliation. The first problem results because most artists can't afford legal representation; the second because artists are afraid that if they assert themselves, their images will not be selected for reproduction, resulting in a loss of needed publicity. Pulin cited cases in which artists, protesting such VARA violations as overprinting of a cover title, were "given the option of withdrawing the protest or having some other artist's work chosen for that cover." Lesser-known artists fear that commercial artists will more readily modify their images than those of well-established artists.**



**Pulin** offered two suggestions: more education and a required (or conventional) notice of VARA waiver much like a copyright notice. She acknowledged that although neither suggestion would solve existing problems, they might help curb abuses.

To educate artists, "short articles in plain English (and Spanish and other languages widely spoken in the United States) could be placed in the arts sections of newspapers all across the country." An information sheet on copyright and VARA could be distributed to fine arts professors who could further distribute it to students and colleagues. **Pulin** also suggested educating "commercial artists and designers, advertising agencies, and publishers," whom she identified as the people who most often violate VARA rights. This could be done by placing "articles and notices in design newsletters and their professional organization newsletters as well as distribution of that information sheet to applied art departments in schools." Notwithstanding some resistance from software manufacturers and distributors, it would be worthwhile "to enclose an information sheet with each computer software package that is likely to be used for modifications of pre-existing images, things like Photoshop and Matisse, and even with disks of images which are sold 'copyright free' -- to point out that VARA rights still exist."

**Pulin** displayed a Frank Stella catalogue she deemed a "blatant example" of VARA infringements: (1) the cover was a detail rather than the entire image; (2) the image on the cover was light because it was taken from a proof; and (3) the image was upside-down. **Pulin** surmised that Stella probably gave copyright permission, but there was no indication whether his VARA rights had been waived.

**Gilbert Edelson, Administrative Vice President, Art Dealers' Association of America**

The Art Dealers' Association of America (ADAA) is made up of leading American dealers in works of fine art. Membership is by invitation and the "prospective member has to be in business for at least five years, has to have an established reputation for knowledge in the field in which he or she deals for honesty, reliability and fair dealing with clients, artists and colleagues, and also has had to make a contribution to the cultural life of the community in which the dealer is located." ADAA's 135 members are found in more than 20 cities and most are located in New York, Edelson noted.

Edelson is Chair of the Committee on Art Law, the Association of the Bar of the City of New York and serves on a number of boards of arts organizations. He has practiced in the field of art law for more than 30 years, representing dealers, artists, collectors, museums, nonprofit organizations and others in the art community.

Edelson divided his statement into two parts: the first dealing with "paintings, sculpture, drawings, and prints" which he called movable works of art, and the second dealing with "major commissioned work such as murals and monumental sculpture or installations." He noted the importance of commissioned works but emphasized that they comprise only about one percent of all art transactions. Most art transactions are in movables.

At the last meeting of the ADAA, Edelson asked if members "had any experience with request for waiver of moral rights in the case of movables." ADAA members responded that they would neither consider asking for a waiver nor had been requested to do so from clients. Several said it would be "highly suspicious" for a client to request such a waiver, and Edelson said he would "advise any artist not to waive this important right when selling a painting."

As Chairman of the Committee on Art Law, Edelson conducted an informal survey of committee members, all practicing art lawyers. "The response was the same as that of the dealers: none was aware of any request for a waiver of the moral right in the case of movables as condition for sale or even otherwise."

Written agreements for art transactions are rare, used only "in the case of certain sales to museums or where a transaction involves very valuable works and there are complicated payment terms or where a work of art is commissioned," said Edelson. The tradition is that "[e]verybody knows everybody and everybody shakes hands."

In negotiating commissions on behalf of artists, Edelson has found commissioning parties were "very sensitive to the artists and their needs." He has regularly requested and received "a permission in the agreement preventing the alteration or repair of the commissioned work without the artist's active participation." Edelson has "never been asked for a waiver of the artist's moral right" but noted that he has been "fortunate in representing established artists in transactions with knowledgeable and sophisticated people who are unlikely to ask for such a waiver."

Edelson thought it too early to measure the effect of the VARA waiver provision on commission agreements, due to: (1) the real estate recession; and (2) the lack of publicity, until recently, about VARA. Most art is commissioned when buildings are built, and fewer buildings have been built since VARA was enacted. "Real estate developers in corporations are cutting costs" and "many corporations have been selling their art collections," resulting in "fewer commissions at least in the non-governmental field."

Edelson noted that as a result of the widely-publicized decision in Carter many lawyers, including those in the real estate field, have been educated about VARA, and he expects to find "more requests in commission negotiations for a waiver provision." Builders or developers will try to protect against permanent art works that might be viewed negatively by prospective tenants or future purchasers. They may argue that "no one wants to be compelled to live with a work of art which he or she dislikes, or which is perceived, possibly to impair the value of an important investment." As a result, "less established artists whose work may appear to be controversial" are particularly disadvantaged since they may feel obligated to sign a waiver in order to advance their careers "trusting that if the work has real merit, it will not be removed."

Edelson said that "repealing the waiver provision will have a 'chilling effect' and will result in fewer commissions for artists, at least by non-governmental entities." Lesser-known artists would most suffer, because any commissions would go to artists whose work is well-accepted rather than artists whose work is perceived as controversial. One alternative is leasing art for installation, Edelson said. Tax advantages exist and "there is at least one company now operating in New York which supplies works of art which could be leased for lobbies and other public spaces."

In conclusion, Edelson stated that, in connection with the sale or proposed sale of a movable work of art, "the practice among dealers and collectors is not to request a waiver of the artist's moral rights...such a waiver would not add to the value of a work, or make the work easier to sell." With respect to commissions, "which represent a very small proportion of the total art market, the situation may be different," he said, adding that "there is reason to believe, in light of the recent litigation, that such waivers may be more often requested in the future."

Edelson believed that eliminating the possibility of waivers for commissioned works would have a "chilling effect" on commissions and would likely "do more harm than good for artists," particularly younger and less established artists.

**Rockne Krebs, Visual Artist**

Krebs, a full-time artist, has supported himself through his art work for the last 25 years. Krebs was commissioned for two projects by two corporations, which both required a waiver. "It was very clear that unless the waiver was provided the work was not going to happen," Krebs noted. Because his works are created with light, he has "come to accept the destruction" of his work; of works created during the last 25 years, only one remains. He believed that copyright "didn't really apply" to him, but waiver is part of his contracts and he was glad to have VARA in place as a negotiating tool.

In one instance, Krebs negotiated a five year period in which the corporation would keep the work "intact"; he was pleased with the arrangement since he has done works lasting for "only an evening." In a recent project in Sacramento, in which he generated images on clouds above the city, he "fought very hard" not to give up copyright. He wanted control over his images "even though they were concrete only in cyberspace." He again negotiated a durational agreement where "[a]fter five years, they can more or less do whatever they want with this [his work]."

Other artists, including high profile artists, often must sign contracts to share copyright with the sponsoring corporation, said Krebs, citing "a very talented young artist," who was forced to sign a waiver in order to get work. The young artist was "eager to do this and

produced for them at least 40 or 50 different images." Krebs was concerned about "future negative impact on" a young artist's work.

"The real question," Krebs stated, "is how is this going to keep works of art alive long enough within our society and to support the talent of the artists who are in fact creative and not undermine their ability to function." He believed "the waiver and the economic facts of life for most artists," notwithstanding a tiny percentage of American artists and their dealers who have the stature to get what they want, require artists to give up their rights in exchange for work.

#### **Questions to the Panel.**

Thanking the witnesses, the Register directed her first question to Carol Pulin and asked whether printmakers generally assign copyright to someone else. Pulin answered that assignments of copyright are rare because contracts are often absent, but artists often give permission to reproduce their works in catalogues, brochures and posters for exhibitions. The Register asked whether a license under the reproduction right (section 106(1)) for catalogues or posters without the right to make derivative works (section 106(2)) implies "that you can do.. certain kinds of things basically allowable" even if the artist hasn't granted that right? Pulin answered that "the publishers and designers who are printing the reproduction seem to think that they do have the right to violate integrity." The Register said she was focusing on "the basic right to control the making of derivative works." Pulin said that "[i]t depends upon the publishers because, while most seem to understand that permission to reproduce that work in a catalogue is just that, there have been cases in which the artists suddenly find notecards made to sell at the exhibit which the artist had not in fact given permission to do."

The Register asked if artists refrain from suing publishers from "fear that their work will not be used in the future." Yes, said Pulin. The Register asked if artists register so that if they sue, they could be eligible for statutory damages and attorneys fees. Pulin stated that "artists who are better off financially often do register their work" but "most of the artists . . . put the copyright symbol and the date and they sign it and go with that." The Register asked whether an artist who registered a work violated as in the Frank Stella catalogue example might bring a VARA lawsuit despite concerns about being blackballed. Pulin responded that, in the present political climate, artists would "overwhelmingly decline to prosecute for fear of being blackballed." The Register noted the similarity between Pulin's remarks and what the Copyright Office has heard with regard to photographs. Pulin remarked that from what she has heard, photographers are in the same situation as printmakers.

The Register asked Krebs whether, in his two commissions, there was a piece of paper that contained the waiver and if he negotiated the five-year duration. Krebs responded that it would start that way, but "[i]n the one instance, they wanted to simply have a joint copyright" and he did not understand how that would affect his moral rights. The Register clarified that the VARA rights are personal and the critical question was whether he would waive his rights. Krebs agreed, but stated that individual artists are "particularly vulnerable" to blackballing, unlike a corporation "that can have a different character with different people." While his commissions have wanted him to waive his moral rights, in both cases he negotiated a five year period in which the work would be kept intact; after such time, he would rely on "community support for a public art work." It is difficult to register public art works unless they are moveable works and "this is an arena where the public and our culture, if we are having our

cultural renaissance, which we definitely are right now, is going to be looking for the largest public impact of art."

The Register asked Krebs if he agreed with Edelson that taking away the waiver provision would be detrimental. Krebs responded that the ability to negotiate a waiver served him well in his work but "waiver is very problematic if the artist gives up a concrete waiver on a concrete piece." Noting that Krebs makes creations in light that are rarely kept in a permanent form, Kretsinger asked whether reproductions are ever made of Krebs's images. Krebs responded affirmatively. Kretsinger clarified that because Krebs assigns the copyright to the commissioning party he doesn't have any control over the reproductions. Krebs responded affirmatively.

Kretsinger found Pulin's suggestion to increase VARA education interesting because one comment the Copyright Office received was that less awareness is better "because then people wouldn't know about the waiver provision and then since it had to be in writing, they couldn't waive." Kretsinger, however, agreed with Pulin that more education was necessary, and noted that since the Copyright Office study has included a "significant" education effort, others should now be responsible for continuing education. Pulin responded, "Printmakers feel put upon every time they have to explain that this is not a reproduction, it is an original work of art; to ask the artists to take on the education of the design community would probably be seen as another example of the Government setting up a law with no provision for enforcing it; that is, guaranteeing them a right but then not doing anything so that they actually have it." The Register noted that VARA rights are granted to authors as part of the civil law, so artists have to be the "enforcers" and the government gets involved only in criminal issues. The Register



commented that Kretsinger was referring to "the days of shrinking federal government activities." Pulin noted that her education suggestions are not expensive but "notice that comes from the Copyright Office and has that imprimatur is likely to be published." Kretsinger commented that she wasn't referring to individual artists so much as to "organizations that deal with artists." She agreed with the Register that the Copyright Office cannot enforce rights, but would try to continue with education.

Expressing interest in Pulin's catalogue, Kretsinger asked if the artist "gave permission for such a use." Pulin stated that she did not know but suggested that Stella might be contacted. Kretsinger responded that she would appreciate that information because "the full image is inside and this is an excellent way to have an introduction to the fact that his work is featured in the magazine," and because it also shows the importance of having a "written contractual agreement."

The Register commented that copyright ownership is critical when dealing with the section 106(2) derivative work right. Moral right is more difficult due to the required proof of harm to the artist's reputation or honor. Thus, "although the moral right is a great right, and the United States should have it, that test of whether or not the reputation and honor has been harmed is difficult." Pulin agreed, especially when one claims that the artist doesn't have a worthy reputation and is unknown. The Register remarked that the "good news" was that in the Carter case the three artists were "validated." She wondered, however, how one would prove, for example, whether Frank Stella's honor or reputation had been hurt.

Kretsinger commented to Edelson that in the "almost five years" that the Copyright Office has been working "at various times on this study," the Office has learned that "in some

ways, it is too early to tell." She said his comment that only about one percent of art work is commissioned was interesting because it was the first time the Office had received such information. "It's a guess but I think it's accurate," Edelson said. Pulin concurred and thought the estimate seemed close. Noting Edelson's comment that due to the real estate slump people might choose other options, Kretsinger asked if he had seen agreements for moral rights waiver. Edelson responded that he personally had not. Kretsinger asked whether his answer included commissioned works as well as movables. Edelson responded that he has never been asked for a waiver and, as for movables, he would be shocked if someone said to him, "I'll buy this picture on condition that I can tear it up." The Register noted that he indicated earlier that he would expect to see more provisions in commission contracts after the Carter case, and Edelson confirmed this.

Douglass asked artist Krebs whether he had any contracts that he might share with the Copyright Office. Krebs responded that he did have a copy of the "young artist's" contract, and would make it available along with his own contract. The Register commented that Krebs could send the contracts and encouraged others to do the same. The Office was not interested in financial information and that blocking those sections out would be fine. The Office was only interested in "the critical language with regard to these types of issues."

Douglass agreed that names and prices could be blocked out, leaving just the relevant terms, and asked Pulin if she thought there was an "affirmative obligation" of the art publisher to say whether VARA rights had been waived. Yes, Pulin said, advocating "some provision that would make it necessary or at least conventional" for publishers to indicate VARA waiver to alert viewers to modifications. "Part of the pressure is that design agencies would do it less

often and part of the pressure is that one would at least know," she explained. The Register commented that "[i]t almost becomes a labeling issue in a sense," and mentioned the issue surrounding film colorization and cropping.

Douglass expressed interest in Pulin's comment about standard language to indicate a grant of waiver. She was "interested in standards developing so that people don't have to come up with language from the beginning." Pulin suggested "[s]omething very simple like: 'VARA rights have been waived by the artist.'" The Register pointed out that "[t]he intent was to grant the right and the waiver was the exception," and that any language should reflect "knowledge and clear intent to waive those rights."

Douglass then sought to clarify that when Edelson said "movables and commissions" he meant "movables and permanent." Edelson responded affirmatively and said "permanent is usually a commission." Douglass asked, in regard to Edelson's comment that he didn't think the waiver provision should be repealed, if he thought "the law should go a little further" and require the artist to "assert his moral right." She explained that in some countries an artist gets the right of integrity only upon asserting it, akin to copyright notice. Edelson responded that he would "rather make it easier than more difficult" for artists, but that he didn't know whether "asserting" the right would accomplish that goal. Douglass stated that "it probably would make it more difficult." Edelson commented that "the simpler and easier it is, the better you are." The Register noted that teaching artists to assert the right would create even more educational problems and that "it really would weigh against artists."

The Register thanked the panel and expressed her hope that panelists would send the Copyright Office their statements, any other thoughts or comments, and any contracts after they

had been blocked out. She noted that those items would greatly add to the Copyright Office's ability to prepare a full report.

**Panel 2:**     **Edward J. Damich**, Professor of Law, George Mason University  
                  **Deborah Benson, Esq.**, of Morse, Altman, Dacey & Benson, and Trustee,  
                                  Massachusetts Volunteer Lawyers for the Arts  
                  **Richard Altman**, Arts Attorney and co-counsel for the artists known as the  
                                  "three Js"

**Edward Damich, Professor of Law, George Mason University.**

After thanking the Register, Damich explained that, although he is a member of the Board of the Washington Area Lawyers for the Arts (WALA), his statement reflected his personal views. He planned to address only two questions: (1) whether moral rights should be waivable; and (2) whether the Visual Artists Rights Act (VARA) should be amended or modified. Further, his comments would only address section 106A(e), not section 113.

Damich first addressed the VARA provisions, noting the "narrow range of works covered" and the "limited scope of the rights recognized." He noted that "the VARA covers the original copy of paintings, pieces of sculpture, drawings, photographic images prepared for exhibition purposes only, and very limited editions of them," that "reproductions for the most part are not covered," that works made for hire are not covered, and that where the destruction of a work is at issue, "only works of recognized stature are covered."

Damich said moral rights should not necessarily be expanded to other industries such as publishing, film making, computers, and music and recording without "reasonable accommodations to the needs of those industries." He thought "the scope of waiver for the works covered by the VARA should not necessarily be a precedent for other works," but that

under the VARA. "closer scrutiny is justified because for the most part, we are talking about one-of-a-kind works of art, which by their very definition would be lost forever if they were to be altered physically."

Damich pointed out that an artist's integrity is infringed under VARA only when an intentional "distortion, mutilation or other modification" occurs to a work of visual art, which is "prejudicial to the artist's honor or reputation." The right protects works of "recognized stature" from destruction by "grossly negligent as well as intentional acts."

He said infringement would not occur for modifications occurring naturally over time or as a consequence of "the inherent nature of the materials." The right of integrity would not be infringed by "normal conservation" or "public presentation." He noted that the rights against modification and destruction are "subject to fair use" and VARA rights end with the death of the artist.

Damich thought the integrity right should not be waivable by advance contractual agreement, but the artist should be able to "consent" to alteration of the work "outside a binding contract." Where the artist gives consent, there should be no liability after alteration has occurred but where the artist revokes consent before the alteration, she should be liable for any expenses resulting from reliance on the consent. Disallowing contractual waivers but allowing revocable consent would be in greater harmony with the "theory of moral rights and the spirit of article 6bis of the Berne Convention," while also being practical since the "reliance risk" would likely be slight.

Damich said VARA's right of attribution encompassed: "(1) the right to claim authorship, including the right to remain anonymous or to use a pseudonym; (2) the right to

prevent the use of the artist's name for a work he or she did not create; and (3) the right to prevent the use of the artist's name for a work that has been altered so as to prejudice the artist's honor or reputation."

Damich then described the differences between the right of integrity and the right of attribution. He explained that waiver of the right of attribution may result in a work being "unattributed" or "misattributed" but noted that a waiver of the right of integrity results in the "loss of the original work...an element of fraud is introduced that does not exist with the waiver of the right of integrity."

A second difference Damich found between the two rights is that a waiver of the right of integrity "may result in an irreversible act," while a work can always be reattributed to its proper author. Damich explained that "the commercial success" of a work may depend on anonymity as where the artist is a convict. Damich would support a "binding waiver of the right to claim authorship where the waiver was as express and as specific as required by the VARA and only where the work is anonymous or a pseudonym is used." He felt that "more artistic creativity would result," but he noted that if this belief were proven wrong by the Copyright Office report, he would revise his opinion.

Damich did not think the VARA should credit an artist for a work she did not create. He thought that the Copyright Office report might be informative on whether such a practice is accepted in the arts protected by VARA, although to his knowledge, it was not.

Damich would support a waiver of the right to claim authorship of an altered work that had been altered with the consent of the author. "Thus, consent to the alteration

becomes a condition precedent to the enforcement of the waiver of the right of attribution in this case."

The last topic addressed by Damich was joint works. He stated that the VARA provision "allowing one joint author to waive all moral rights for all other joint authors" was opposed to the theory of moral rights and "inconsistent with the VARA's prohibition of the transfer of moral rights." Damich pointed out that the VARA right which is a personal right, can, in effect, be waived by an unrelated party and could result in "irreparable alteration" or "destruction." Damich stated that the "results of this provision are so anti-personal that they cannot be outweighed by the benefits to be gained by ease in obtaining waivers, especially when we are talking about the permanent alteration or destruction of originals."

Damich stated that in regard to the right of integrity "the consent of every joint author must be obtained," and that in regard to the right of attribution, "waivers must be obtained from each joint author whose right of attribution would be affected."

**Deborah Benson, Esq., of Morse, Altman, Dacey & Benson and Trustee,  
Massachusetts Volunteer Lawyers for the Arts.**

Benson has practiced law for 13 years at the intellectual property firm of Morse, Altman, Dacey & Benson in Boston, Massachusetts. She has counseled clients in "acquisition, protection, license and sale of proprietary rights of all types including copyrights, trademarks, and trade secrets." Her clients have included "publishers, authors, graphic design firms, graphic designers, advertising agencies, illustrators and visual artists

including New York artists Jeffrey Schiff and Stephen Antonakas." She noted that both Mr. Schiff and Mr. Antonakas have received "numerous public commissions."

About six years ago, Benson founded Volunteer Lawyers for the Arts of Massachusetts, "a joint project of the Boston Bar Association, the City of Boston Mayor's Office of Cultural Affairs and the Artists Foundation." She explained that "VLA of Massachusetts, like most VLAs, provides pro bono legal assistance to artists and arts organizations who meet certain financial criteria," and "educates both the artists and legal communities about legal issues affecting artists." Her comments would reflect her personal views but she thanked the Copyright Office for inviting her and the VLA to testify.

In Benson's view, the waiver provisions "effectively negate" the protections of VARA because of: (1) the unequal bargaining position of artists; (2) "limited opportunities for commissions, especially public commissions of sculptural works, works affixed to buildings and site specific art work where waivers are most likely to be sought"; and (3) "contract language which is consistent with the law and no greater." Thus "the law must be as strict as it can be or it will be meaningless."

Benson noted that many artists still do not know about VARA. A survey was conducted in 1992 by VLA of Massachusetts, in response to a request for information from the Copyright Office for its interim report to Congress. The survey sought information from 22 well-established Massachusetts artists, "over half of whom had done commissioned work within two years of our survey" and who were known locally and regionally; "almost all were represented by dealers, galleries or agents." The 1992 survey showed that about 30



percent of the artists were aware of VARA. In 1995, 50 percent of the same pool of artists were aware of VARA. She cautioned that the other 50 percent were still unaware.

As a result, she said "there is limited opportunity to document fully the effect of or likely effect of the waiver provisions at this time." Many non-commissioned works of art are sold without written contracts. Some evidence is beginning to emerge that buyers are seeking "insurance provisions in commission contracts which will, whether or not such provisions are exercised, enable them to avoid violating the law." Pre-VARA contracts "which were executed in states with artists' rights acts" could help to identify the intent of "buyers and commissioning parties."

Benson noted that the court in Carter v. Helmsley-Spear established a "relatively low threshold for qualifying a work as a work of recognized stature," and that "removal which results in the destruction of the work will, in most cases, violate the artist's rights of integrity under VARA." Even when contracts provide an artist with the right of consultation before a work is altered or removed, the provisions usually end up favoring the commissioning parties. Benson cited as an example a 1986 Art Commission Contract with the Municipality of Metropolitan Seattle for the Downtown Seattle Transit Project. The contract provided for the artist's written approval prior to any alteration, modification or removal but then allowed the commissioning party to remove the work even without such approval. It allowed the commissioning party to remove the work even though the work may be altered or destroyed in the process. The contract would allow the artist to repurchase the work but only if it is "not incorporated into any larger piece and it can be done without expense to the commissioning party." She noted that such language in an agreement today

would "operate as a waiver," and shows the "commissioning party's intent to control when and for how long the art work will remain in its building."

Benson pointed out that contracts for the "Massachusetts Bay Transportation Authority for its 'Arts-on-the Line' program," gave the MBTA the right to remove the work and to salvage the work, if possible. She noted that most of the "Arts-on-the Line" contracts were pre-VARA and followed somewhat the language of the Massachusetts Art Preservation Act, which "provides that moral rights in a work of art which cannot be removed from a building without substantial physical defacement, mutilation or alteration are automatically waived unless they are expressly reserved in a written agreement." Such contract provisions exemplify the intent of commissioning parties to provide only those rights that are required by law.

Benson said artists she has worked with who have received public commissions tell her that their commissioned works are designed specifically for the installation space and that removal of the work would destroy the work. Government commissions do not allow negotiation for specifics such as "the future of the art work in the context of that space or elsewhere including its possible removal for whatever reason; for instance, if the building is to be torn down or if the public dislikes the work, or if the work creates a public hazard safety issue or is a nuisance." She said that in regard to removal of the art work, the contract is usually pre-written and "vests all rights and decisions with the commissioning party." This applies to established artists as well as non-established artists "if the artist wants the commission."

Benson explained that waivers also exist in more recent mass transit and public art commission contracts. She mentioned a 1994 contract for a temporary installation with the Massachusetts Highway Department for the Central Artery Tunnel Project, which stated that the artist's work was temporary and, thus, could be destroyed by the Highway Department. "[T]he most sweeping waiver language can be found in a 1994 commission agreement with the Los Angeles County Metropolitan Transportation Authority." She explained that the Authority, in its "sole discretion," could move the work even if the removal resulted in "destruction, alteration, or other modification" of the work, and that the artist had to waive all rights under the "California Arts Preservation Act and under VARA." Benson thought those provisions were too broad and show the commissioning party's intent to strip artists of moral rights and prevent claims under VARA. Benson thought it was interesting that "California, which really holds itself out as a state favoring artist's rights, and having many laws favoring artists as well as the only state in the country with a Resale Royalty Provision, also required the artist to both limit and waive its rights under their resale royalty provisions." Benson noted that the waivers were unlimited in duration, and told the Register that she brought copies of the contract provisions.

Benson next addressed the question of whether, proportionately, more waivers are given for artistic works incorporated in buildings than for other types of works. If that were true, she said, it could be due to the narrow scope of VARA. Benson has "drafted many commission contracts under the Massachusetts State Statute which frequently, if not always, include provisions for waivers of moral rights." She noted that artists are not compensated

for the waiver. Waiver language can now be found in legal treatises and form books, and a "broad general waiver" can be found in the Publishing Law Handbook.

Benson concluded by stating that "artist's moral rights are routinely written out of their contracts." The law needs to be more strict to "prevent the wholesale and generally nonnegotiable waiver of these rights," but a chilling effect on commissioned works may result if waivers are prohibited. If the law is meant to protect artists, Benson stated, the waiver provisions should be, "if not repealed, then substantially circumscribed."

**Richard Altman, Arts Attorney**

Altman said that he was speaking purely on his own behalf, as the attorney who first represented the artists in Carter v. Helmsley-Spear, and first brought suit and obtained a temporary restraining order in the New York State Supreme Court under a New York statute which is similar to VARA. He wished to speak about the case only in so far as it related to the issues at the hearing. Altman thought the facts of the Carter case were "striking" and "anomalous" and represented "a clash between two supposed values that we believe in deeply: art and real estate." As a result, he would be concerned if the case "became the basis for policy decisions." He "feared" that real estate would prevail in the end.

In visiting the installation site and discussing the art project with the three commissioned artists, it became clear to Altman that they would not have invested so much time and effort in the project if they had expected the work to be "torn down." "It would have been difficult to justify it." The space was "enormous" and the artists worked for two and a half years on the project, "practically living" in the place. At the time the contract

was signed in December, 1990 which was six months after the effective date of VARA. neither party was aware of VARA. Altman noted that no rights were waived in Carter

Altman agreed with the distinction drawn by Art Dealers Association's Edelson between works of art in buildings and works of art which are moveable. The owner of a building might need to "preserve some kind of prerogative" because there may be difficulties in getting a building owner to commission a permanent work of art for a building which cannot be removed without destruction unless the owner is given some "leeway." Altman thought that the main problem stemmed from the impossibility for an artist "to know at the time, the value of what is being waived," especially since the value may change; once waived, the rights are gone.

Altman felt it was necessary "to protect the artist against the consequences of his or her own folly." He believed waivers should be prohibited, with a possible exception for buildings. When an artist becomes successful, the personal rights become part of the "cultural patrimony" that VARA "is supposed to be protecting." He found problematic "the distinction between the famous and the not famous, which the waiver provision makes explicit." Because a particularly well known artist is an "artist of sufficient stature," in a contract with a gallery he can refuse to waive his moral rights. It would be wrong to "allow these rights to stay or to go based upon the reputation of the artist." Altman mentioned that he was told that the New York Transit Authority, in its contracts for public art in the New York City subway system does not, "as a matter of policy," ask for a waiver; after they commission a work for the subway, they keep it there. He noted however, that he recently





noted that this remark raised an issue that was not appealed, resulting in "either implicitly or explicitly overruling what the statute says." Damich said one way to avoid the provision is to sign an agreement among all joint authors at the outset. The Register explained that this was the point she was driving at. Damich said, however, that, considering the extent to which artists are unaware of VARA rights, it would be "unrealistic to say that it [waiver of rights] would be adequately treated by bargaining among joint authors in the context of these kinds of works."

Noting earlier comments by the first panel that artists fear being blackballed, the Register asked whether, due to the unequal bargaining power of most artists and the nature of the business, artists would assert their rights even if waiver was prohibited. Benson thought well-known artists who can refuse public commissions are the exceptions. "Either they are capable of negotiating a different contract, which is extremely unusual, or they walk away, and the rest of the artists, even those with substantial reputations, sign the deal," she said.

Kretzinger thanked those who had helped the Copyright Office with the VARA study, and said the Office was eager to receive additional materials referred to in the testimony. She noted that it would be appreciated if the Copyright Office could direct questions to witnesses after reading their written comments.

Kretzinger asked whether the requirement that a waiver must specifically address the work and uses to which the waiver applies solves any problems the witnesses mentioned. Benson said no court has yet interpreted that language so it would be hard to speculate. She predicted, however, that once a court does address the language, more specific language will



be seen in contracts. Kretsinger noted that, since this Congress is probably not going to repeal the waiver provision, it is important to see how the waiver should be addressed to help artists who are in unequal bargaining positions. Agreeing with Carol Pulin's emphasis on VARA education, Kretsinger thought that at least if artists had knowledge, even artists without equal bargaining power could set some limits for waiver by offering substitute language.

Benson asked if one could satisfy the VARA waiver provisions by saying, "I could remove the work of art from the building if I were to sell the building and the buyer didn't like it." Benson noted that such a statement could result in destruction of the work as surely as a full waiver. Kretsinger agreed but noted that provisions in section 113 would allow artists to try to remove and retain a work. Kretsinger asked if Benson believes artists have no way to protect their rights. Benson responded that the site-specific nature of the work generally means that any removal results in destruction of the work. Even a more specific waiver in which removal is still allowed could result in destruction of the work.

The Register noted that one thing the Copyright Office has observed looking at international law and cases, is that, while a continental country may have statutes favoring the artist, courts will evaluate the facts and sometimes act similarly to an American court. She asked Professor Damich if he agreed, and Damich did. He noted that while much of the language in French cases and statutes is very beautiful regarding the inalienability and non-waivability of rights, in practice waivers are recognized to some degree, although not entirely as in the United States.

He noted that he had not looked at the French cases in several years, but questioned whether a French court would recognize waiver of a right in a limited context where, for example, the artist would say, "Yes, I don't mind if you would slash my painting or put a swath of black paint across it or something of that sort." Damich said the narrow scope of the rights at issue coupled with the fact that all the interest groups pressured Congress for exceptions has resulted in his opposition to waivers in this context.

Douglass asked Benson about Pulin's comment that no systematic educational campaign is underway to educate artists. Douglass noted that Volunteer Lawyers for the Art groups do educate their members, and asked what else Benson thought could be done. Benson commented that more of the same would be good. Her group held a forum in Massachusetts with the Massachusetts Cultural Commission using questionnaires to address the issues and asking artists to complete surveys during the forum. Very few artists attended the forums, however, and while she disliked generalizing about artists, she noted that unless a matter becomes meaningful to them, they often ignore policy and concentrate on art. As a result, it would be necessary to continue to hold forums and to educate slowly.

Douglass asked Benson whether, if a study were done over the next five years, the results would reveal more educated artists. Benson said she thought that would be true, but said that artists are still uncertain of their basic copyrights under the 1976 Act. Douglass commented that artists aren't the only ones who are confused.

Kretzinger mentioned that her favorite survey comment was from an artist in South Dakota stating twice that the artist did not support pornography in the arts in any form; other than that, the rest of the survey was left blank.

Responding to Douglass's question about education, Altman noted that litigation always brings attention to an issue. While aspects of the Carter case are troubling, the publicity generated by the case, with articles written in art magazines and newspapers, does inform artists about their rights.

Douglass asked Altman about the San Francisco artist Richard Serra who refused a commission to avoid waiving his moral rights. Douglass was curious whether the idea of waiver contradicts the underlying philosophy of copyright, which is aimed at encouraging creative efforts for the benefit of society as a whole, since the artist may simply walk away from a commission rather than sign a waiver. Altman noted that while creation is a positive goal, artists cannot be forced to create art. He related the famous case involving a fight between Lord Eaton and Whistler over a portrait where Whistler retrieved the portrait and refused to deliver it; Whistler kept the money and told Lord Eaton to go to hell. Altman said that Lord Eaton lost his suit against Whistler due to "a right of divulgation" -- the artist's right not to produce. Douglass noted that was a moral right the United States does not have under VARA. Altman agreed, but added that by refusing to sign a waiver an artist refuses to create art under certain conditions, and such a right should be respected.

The Register mentioned that such a right exists today under work made for hire. Under the economic rights theory, "you either do it for hire or you don't do it." Benson noted that the converse is also true. Absent a waiver, there may be fewer buyers or commissioning parties, which results in less creation and undermines the public policy of encouraging creation of work. Kretzinger noted that Edelson raised that point earlier as well. Benson thought it was a difficult conflict to balance if the objective is to create more

work. The Register said, "that is part of the Constitution and that's part of copyright, period." Assuming the work has been created, she thought the issue is what kinds of personal rights should attach to an artist because it is the artist's creation.

**Panel 3: Dale Lanzone, Director, Cultural and Environmental Affairs Division,  
General Services Administration**

Lanzone's responsibilities at the General Services Administration (GSA) include managing the Federal Government's Art and Architecture Program. The GSA commissions art work "as a means of celebrating and giving substance to the purely creative moment of our time." The process is shared and involves "local communities, commissioned artists and the tenants of our buildings. Panels of art experts, local community representatives who work with the artists, and the building tenants" all work together to develop an "artistic concept for a particular site," Lanzone explained. Because of the site-specific nature of the commissions, section 113 is important to GSA. Funding for commissions comes from money set aside from the "construction budget of each project." The exact amount of money allotted varies from "one half of one percent to up to two percent depending upon the particular project, the location, and the possibilities that are available for works of art." The process of developing a concept is "fluid" and "dynamic." Lanzone explained that the artist makes a proposal which is reviewed by "this collaborative group of people." When an agreement is settled between all the parties, a final contract is drafted addressing the artist's rights. The GSA tries to "very specifically define what the salient characteristics of a work of art are, the range of the context of the work of art within the building." As an example, he noted that if an artist were creating a large scale wall mural, one might ask whether the

artists intend that certain "view planes" be maintained or if there are particular "architectural features" the artist sees as part of the work. He explained that the answers to these questions must be negotiated, taking into account "the need to manage a building in the future, the kinds of changes that may be programmed, both known and unknown, for a building." Eventually all agree on "what characteristics of the piece the provisions of the Artists Rights Act applies." The work is then created and installed.

Lanzone mentioned that the GSA does not have a problem with the existing provisions of sections 106 and 113. He explained that GSA has been successful at working with the provisions to balance the needs of all the parties.

#### **Questions to the Panel**

The Register asked Lanzone whether GSA deals with an artist while negotiating a contract. "Yes," said Lanzone. The Register asked whether they requested an assignment of copyright to the United States government. Lanzone remarked that "the artist maintains copyright." He explained that GSA commissions require the artist to create original works of art and forbid an artist to make another work of art that is the same size or configuration absent prior consent.

The Register noted that the last panel basically proposed a repeal of the waiver of the integrity right, especially due to the narrow scope of works addressed by VARA, but noted that the panel thought section 113 should stay the same. The Register asked Lanzone what he thought about that. Lanzone responded that he thought repeal of the waiver would hurt management of the program "in the context of dynamic buildings that grow and change." He noted that for works of art that are "contextual in nature" it is important to understand and

agree upon the context. Contextual issues play a role "in making future management decisions about the works of architecture, about the public spaces, about introducing new requirements in accessibility -- fire safety issues." Defining the salient characteristics of a work entails exacting specifications and descriptions of the context of the work. The Register asked if those kinds of questions were addressed in their contracts. Lanzone responded affirmatively.

The Register asked how many commissions GSA extends per year. Lanzone said they have "63 commissions underway" and "21 in process." He said they "manage on an on-going basis about \$14 million dollars worth of commissions," ranging from "\$1 million to \$9,500 dollars." They have "a range of types of artists and scale of architecture and works of art."

Kretsinger thanked Lanzone for his information and participation in the Copyright Office's interim report. Lanzone gave Kretsinger a copy of the GSA contract. She asked whether the contract language changed after VARA was enacted. Lanzone responded affirmatively, adding that the contract language requires a definition, negotiated specifically in regard to each work. Much of what GSA "struggled with since the removal of the Tilted Arc . . . was dealing with the issue of contextuality." The issue of contextuality was a major concern of the artist and was "probably central to the misunderstanding of the agency in dealing with the Tilted Arc," said Lanzone. The agency viewed the work as "an object placed on the plaza to be viewed as an object rather than a device incorporating the plaza, the building, and requiring all of those elements for its meaning." Lanzone emphasized the importance of communication of these kinds of intentions at the outset so that, if necessary,

GSA can "negotiate a change in the piece or negotiate an acceptable context for the work of art."

Kretsinger asked if he had encountered an impasse since VARA where no compromise was acceptable between the artist and GSA. Lanzone said "no," and explained that the element of "surprise" is absent: the artist takes everyone's concerns into account when developing the artistic concept. Kretsinger asked if, when an artist declines a contract, it is for some other reason. Lanzone responded affirmatively; more than anything, artists would walk away from the "offer of a commission" rather than the contract. This usually happens "because an artist feels that a site is just not appropriate to their work."

Kretsinger asked whether, due to the tightening government budget, there is a decrease in these commissions. Lanzone answered that their funds depend upon their building budget, which is on a "building-by-building basis." Thus, if their building program were to decrease, so too would commissions. He pointed out that they did not know where it's going right now. The Register stated that the Copyright Office was in a similar position with respect to saving the Office of Technology Assessment. Lanzone noted that the GSA presently has many projects under construction where they have purchased land. "The 63 projects that are underway are fundamentally in place" but future construction was "more questionable."

Douglass asked whether GSA contracts were standard contracts negotiated with individuals based on circumstances. Lanzone answered that GSA has a standard contract with greatest flexibility in the area of artists' rights. Douglass asked whether the concerns surrounding waiver were monetary or personal on the part of the artists. Lanzone explained

that the concerns are not monetary, adding that the concerns might be monetary if they decided to obtain copyright registration. However, he explained that since they don't want copyright, the issue is never raised.

Douglass asked whether GSA contracts were similar to private contracts. Lanzone said that their contracts probably favored the artist more. GSA commissions are not business propositions and must balance interests, mostly between "use of the structure; use of the building; potential changes to it; and how the work of art may or may not affect that."

Douglass asked Lanzone if he would agree to a provision suggested by Benson whereby an artist could remove pieces of a work that would otherwise not be capable of removal without destruction. Lanzone asked if Douglass meant that the alternative would be destruction of the work. Douglass said that instead of having a waiver, there would be a provision where the artist would have the right to come in and remove pieces of the work, similar to the right artists have with removable art. Lanzone stated that such a provision would be meaningless since if the art work were removable, the federal government would make provisions for relocation if the building was going to be demolished, but where an art work is incorporated into a building "the cost of removing such a work would be extraordinary." He explained that the artist would probably not be able to exercise such a right.

**Panel 4: John Carter, John Meade Swing, John Veronis, Jr., Artists, (a/k/a the three Js)  
John McGreevy, Attorney, Hughes, Hubbard & Reid, co-counsel for three Js  
Thomas Schwartz, Vice President, Helmsley-Spear, Inc.  
Adrian Zuckerman, Attorney, Davidoff & Malito, counsel for Helmsley-Spear**



**John Koegel, Arts Attorney  
John McGreevy, Attorney, Hughes, Hubbard & Reed**

**John McGreevy, Attorney, Hughes, Hubbard & Reed**

McGreevy first introduced Amy Barish, a clerk with their firm, and then introduced the artists John a/k/a. J.J. Veronis and John a/k/a Johnny Swing. John Carter could not be present but his written statement was submitted for the record.

McGreevy stated Hughes Hubbard was co-counsel along with Richard Altman for the trial and the appeal of Carter v. Helmsley-Spear. He agreed with the conclusions of Benson, Altman and Damich regarding the waiver provisions. In his role as counsel for the three Js and as lawyer at a large Manhattan firm representing primarily corporate interests, he could predict the result of the waiver issue, especially the section 113(d) issue. He agreed with Benson that there is already standard language in form books regarding waiver, and thought it would be in PLI books soon. He compared the waiver issue to "freelancers' rights relating to the electronic publication of material from periodicals. The standard form freelance agreement is being expanded to cover the electronic publication of articles and photographs." Authors and photographers are not compensated for the extra publication, and McGreevy expected the same outcome for VARA waiver.

McGreevy could see the waiver becoming a standard part of any contract between artist and building owner or between building owner and tenant, with tenants being required to "obtain waivers of VARA rights before any art work is entered into." He acknowledged that the tenant--building owner issue arose in Carter because "Helmsley, the party to which the three Js entered into their contract with, was the tenant of the building, albeit a tenant

with a 47 to 48 year lease." McGreevy agreed with Damich that the joint authorship provision is flawed. He believed that the "united front" presented by the three J's was central to that the survival of the case.

**Johnny Swing, Visual Artist**

Swing believed there is no need for a waiver in relation to section 106. "There is no circumstance where a work that is not interrupting a piece of private property should ever be altered, mutilated or destroyed for any reason. When a transaction takes place with a piece of art work either bought or acquired, it's done with the intention that it's wanted, and if it's wanted, then it's wanted in the condition that it's acquired in," said Swing.

Swing believed that section 113 was worthwhile, but that language was needed to specifically define the writing, such as that currently found in section 106. While such a position might seem contrary to his own case, if the three Js had negotiated with section 113 in mind for the Queens project, the art work might have been developed differently and might have still been a successful project although later it may have been destroyed. Swing noted that during the project continual negotiations took place with the person they thought owned the property, as well as with engineers, architects and plumbers. He noted the artists' surprise when they discovered that the owner was really another entity since the work was meant to be permanently installed.

If the same project were offered to the three Js today, and a waiver were presented, Swing said he would probably still undertake the project but would design it differently. For example, he would design the work to be removable and develop it on a smaller scale.

Swing showed pictures of the work in the Queens building. He commented that a project of that magnitude probably had never been done before and probably will not be done again. He thus thought interesting that it was "the first test of this law." One picture he described as "a view looking about one-tenth of the space down the hallway, mosaic on the floor, sculptures on the ceilings, the walls," with the mosaic related to the ceiling sculptures. He described an area that housed a 45-foot suspended ceiling sculpture. He described the sculpture as "kinetic" and noted that "the tiling on the floor is involved at looking up at the piece." He explained how above a 100-person passenger elevator he created a piece that spoke and sang to the passengers, giving the work "humor" and "childlike" qualities.

If waivers were prohibited, particularly where large amounts of work were at issue, as in Lanzone's commissions, Swing said "the work would have to be clearly pre-determined, which in my mind is contradictory to the nature of making art." During the artistic process, there was a "continual rapport" with the people they were working with and their project continually "metamorphasized." Absent a waiver provision, artists probably would not be given such flexibility.

Swing observed that most artists are on the lower end of the economic ladder. Thus, he thought the law was a useful "leveling mechanism." If there were language in the statute describing what waivers might be like, he suggested, it would benefit artists in executing contracts, especially those who can't afford or don't consult a lawyer.

**J.J. Veronis, Visual Artist**

Veronis, one of three artists involved in Carter, related that when the project was interrupted on April 6th or 7th, the three Js sought to protect the work from possible alteration, mutilation, distortion or removal. Until that point, they were unaware of VARA. Many artists he knew also were unaware of VARA, that the publicity of the case has awakened many artists to their VARA rights. Veronis stated that "upon hearing about it and finding more out about it, it really was very exciting and also quite a relief and, in a way, it was looking over our shoulder and having a guardian angel to protect us with this project in this situation."

Most of the commissions Veronis has experienced in the past have been oral contracts. Thus, the waiver issue never really existed. It was unfortunate that the issue being litigated was framed as building owners versus artists. In his experience, commissioning parties usually commissioned the work because they liked the work.

Veronis thought the first part of the waiver in section 106A was unnecessary, and most patrons would not alter or change works that they purchased. He acknowledged that an artist who was not successful and who needed the money might feel compelled to waive his or her rights in order to obtain work. On the other hand, if an artist could afford to place integrity in front of finances, then an artist might refuse a commission. He thought it critical to have open communication and clear understanding of what each party was expected to give and what each would get in return. He noted that in making their work, the three artists made a conscious effort to comply with building codes and regulations.

Veronis noted that the waiver provision in section 113 is important because it prevents the owner of a building from having to keep a work he or she doesn't want, while allowing an artist to better understand the circumstances regarding the work.

In conclusion, the artist reiterated his disappointment that the issue has been presented as patrons against artists, so that buying art work is seen negatively instead of positively. He stressed the importance of communication at the outset as a way of avoiding problems later.

### **Questions to the Panel**

Addressing the joint waiver issue, Swing noted that it was extremely personal because in about 99 percent of cases, people are not making money off the copyright. He found it interesting that the issue was being discussed at the Copyright Office "because most of this deals with people making a profit off of things and really all we have to take home at night is our pride." If the parties could agree to make the work together then they should be able to work together in deciding whether to waive their rights. He disagreed with the other two artists that more communication is the key, believing the artist was at a disadvantage in any communication. "Money talks and the more work you all can do to limit the communication that we would need to do in strength of our position would be wonderful," he said.

The Register said that the United States has a treaty obligation to implement moral rights which are personal. She said that the issue regarding joint waiver was interesting because if any of the artists had waived their rights, it would have affected the other two who also had their personalities in the work. She asked what, if anything, the artists would

do differently if they became involved in a similar situation and all parties knew about VARA.

Swing answered that because the rights protect the artist, the artist is not responsible for bringing them up. He would not raise them while negotiating a contract or commission. It is the owner's responsibility to know about VARA rights and initiate communication about them.

Veronis commented that, if both parties had known about VARA, the project they undertook would have been built differently. It, however, he had been required to waive his rights and there was a prior understanding of how the project would look in the end, he would not have participated at all.

The Register asked whether Veronis would consider an arrangement to keep a work in place for a certain number of years as part of an agreement in a contract. Veronis said that would depend on the circumstances. For example, for the "scale and scope" of the work they had done, ten years would not be long enough, but if the work had been a smaller project, maybe then would be an option. Swing agreed: "It just would have been a different piece with the waiver."

Referring to earlier comments regarding joint waiver, the Register noted that the law permits any one artist to waive the rights of the other two. She wanted to know whether the artists, if working on a joint project and having knowledge about VARA, would consider signing an agreement not to waive the rights. Veronis responded that had they known about VARA at the outset, he thought all three of them would have "willingly signed that for each

other's protection." **The Register** inquired whether artists were likely to do that. **Veronis** replied, "[n]o, artists aren't likely to do anything, not if it involves their well-being."

**Kretsinger** thanked the artists for bringing photographs of the work and noted her appreciation for being able to see the full scope of the work for the first time, giving her a much better perspective of the time and effort involved in the work. Although it had become clear to her that artists usually don't negotiate written contracts, she was curious whether the parties had an agreement as to the duration of the project.

**Swing** responded that there were "implied thoughts during the beginning of this project that it might go on forever, that we might be virtually an implant, that once we finished the inside, we'd do the outside, and once we finished the ground floor . . . it was sort of something that was getting better every day." **Kretsinger** said she was very interested in implied costs and sought to clarify whether there were oral discussions between the parties. Both artists responded that they had an oral contract that was renewed every year. **McGreevy** said that there was a written contract for a term of one year which was renewed for another year, then renewed at the end of the second year for what he thought was an open-ended term.

**Swing** related a story of a previous commission from a skiing partner who, over drinks at the end of the day, brought up the topic of having **Swing** create sculptures for the roof of his building. The patron asked **Swing** how much he thought it would cost him. **Swing** responded that he didn't know but estimated it would cost between \$10,000-\$20,000. The patron asked **Swing** if he would get a different product for the lesser amount. **Swing**

responded that he would not. The patron then offered \$15,000 for the project and Swing agreed. They shook hands and the deal was done.

The Register asked whether Swing produced the sculpture on the top of the building for \$15,000. He affirmed and noted that the sculpture is still in place. He noted that there was nothing written and that under present law they will be there forever. Swing said that the patron testified at the Carter trial to the benefit of his work.

Douglass welcomed everyone and wished Veronis a happy birthday. She said she heard of a case where a photographer was paid for work after it was completed with the check stamped "work for hire." She explained that work made for hire meant that the photographer would not be considered an author by law, but would be an employee. She asked whether the panelists thought that either before or after a work was completed, people would try to describe a work as made for hire to avoid the provisions of VARA.

Veronis answered that he didn't think so. He explained that obtaining copyright was important to the three Js even before they knew of VARA. At the outset of the project, before they were aware of VARA or the work for hire issue, they sought to make clear that the work was a commission and the artists were independent contractors, even if not in those exact words. They "were emphatic about claiming copyright to all the work" as a way of proving their ownership of the work. They made it "emphatically clear" that they would have full control over the concept, appearance construction and of the work. "The work for hire as we now see it in VARA" he said, "is almost like a technicality that we weren't aware of before and we didn't really plan on getting hung up by it."



A member of the audience interjected that he worked for an organization of commissioned writers, and had seen "a very short written contract that required the author of the piece to sign that it was a work made for hire." He did not think many authors understood what "that term meant or what was implied by the legal conclusion in the copyright," and noted the potential advantage given to those offering work made for hire agreements.

McGreevy noted the uniqueness of the Carter case as "probably the only case in United States history where the work for hire issue was litigated when the ownership of the copyright was not at issue." The Register agreed. McGreevy thought it was the New York VLA who submitted an amicus brief in the Second Circuit taking the position "that the copyright ownership issue was dispositive of the work for hire issue." He noted further that they had many discussions about "whether or not it was dispositive and whether or not it was just a second use for the work for hire test." He thought the case was interesting for that reason and he mentioned that the "copyright ownership was set forth in writing in the first contract, so normally that would take care of the work for hire issue." He explained that "the way the work for hire issue arose here and the application of VARA and the work for hire test to VARA here was something that was not really anticipated."

The Register asked about the continual payments every week. Swing said the payment schedule was worked out as a result of his prior experiences with commissions that continued longer than anticipated. It was done "to make sure that as something grew, the negotiations didn't have to grow and as both parties were happy with each other, that didn't have to be renegotiated with every ounce of the work."

Douglass asked whether McGreevy thought the section 106A waiver is unnecessary and should be repealed. McGreevy said he thought the artist had meant that he didn't see any purpose for the section 106 waiver provision "in a situation where a work could be moved or removed." Douglass sought to clarify whether it was his opinion "that it should not be repealed for the section 113(d), that it is well-balanced as it is." Swing responded that "[s]ome of the language from section 106 should move over to section 113." McGreevy explained that the language in section 106A was more specific in terms of what needs to be "encompassed within the writing and section 113(d) does not have the same specifics." The Register asked whether "that should move over to section 113 and we don't need waiver?" McGreevy responded affirmatively.

Douglass asked Veronis what else he thought could be done to further inform the public about moral rights. Veronis responded that, although he was not a publicist, he felt that the article appearing in Art News was informative and alerted many people to the issues. He noted that news clips were informative and that friends of his from across the nation were calling him and inquiring about the issues. The three artists received and completed the Copyright Office Survey, which he thought was very helpful. Additionally, he thought that information would spread by word of mouth between artists more quickly than it would any other way.

Douglass asked if the case had affected their careers. Veronis responded that he has been identified as being involved with the case and that it hasn't negatively affected their careers. In fact, he was about to enter into a commission and had been asked to draft a

contract. He noted that he was "seriously considering" the waiver issue and felt that the discussion at the hearing had been helpful to him.

**Thomas Schwartz, Vice President, Carter**

As a real estate owner and manager, Schwartz said he intended to discuss the effects of the waiver provision on real estate and did not intend to discuss the Carter case. He noted that the case was on appeal.

Schwartz said that the waiver provision as it relates to real estate is not very complex. "As public awareness of this law increases," he noted, "the issue from a real estate standpoint, an owner or manager's standpoint, falls under the same category as having a hazardous material. Not that it is hazardous, but it is in the same category." He explained that an owner will try to protect his future rights in the property.

Schwartz said the present law is wrong in allowing a subordinate interest to obligate a superior interest. He explained that, "[i]f you are an owner, it allows you to obligate a mortgagee . . . . If you are a tenant, it allows the tenant to obligate the owner, as in the case Carter v. Helmsley" and added "[t]hat's why we are appealing it."

Schwartz said that commissioning art is "not a bad thing" but that the only way an owner can protect himself is to commission a work that is moveable and non-site specific. Such a situation occurred not only in the Carter case but also at 250 Hudson Street where Swing had his commissioned work on the roof. Schwartz explained that an owner encounters many problems, like not being able to put a No Smoking sign in an area in which an art work has been completed. In New York City, not having a No Smoking sign can be a building violation which produces fines ranging from \$500-\$1,000. He stated, "Put a No

Smoking sign on it, you interfere with the art. Keep it off and you are in violation of the building code." He thought the law and the waiver were too broad and needed to be "dramatically defined."

**Adrian Zuckerman, Attorney, Davidoff & Malito; counsel for Carter Zuckerman** noted that he was an attorney with Davidoff & Malito and that they represented Carter, the property owners in Carter v. Helmsley-Spear. He commented that they represent many property owners, managers and lending institutions in real estate. He thought VARA has created several problems for the real estate industry, the greatest being "its lack of specificity with regard to whose consent is really necessary for the installation of any art work, or a more precise definition of what that art work entails." He read a statement on behalf of the Real Estate Board of New York:

**The Real Estate Board of New York, Inc., which represents over 4,000 owners, managers and brokers of property in Manhattan, is prepared to go on record as in favor of protecting an artist's rights so long as the consent of the owner of the property is obtained prior to the installation of the work of art.**

**Zuckerman** noted that the statement and Schwartz's comments hit the "crux" of the issue. He said that the artists in Carter were hired to perform work by a long-term net lessee of the property without the owner's knowledge. He noted that "[t]he exact time when the owner became aware of it was an issue in the case and was a stipulated fact." He thought the exact time period was not important since the owner would have been without remedy under VARA.

**Zuckerman** noted that the owner has "the right to grant anybody he wishes any kind of interest in his property." A tenant who commissions an installation on the property

without the owner's consent however, leaves the owner without any recourse under VARA. In such a situation, the tenant's interest in the property "may expire by default, by expiration of time, by any number of means. They have to vacate the property and the owner is left with the art work." The real estate industry is thus concerned that "a person having a limited interest in property can, in effect, grant or give under this law, to a third party, a greater interest in that property than that person or entity has." As a result, he thought the law as applied in the Carter case results in a "taking" and is unconstitutional.

The Register noted that the constitutional issue was brought up in the case.

Zuckerman agreed that constitutional issues were raised in the case and are currently on appeal to the Second Circuit, along with other issues. He did not believe "the real estate industry singularly or as a group is against art." He agreed with Veronis' earlier comments that art and real estate should not be viewed as in opposition. Zuckerman said both should work together, and one way to accomplish this would be to have a provision requiring the artist to obtain the owner's prior consent. Just as there is a method for recording interests and conveyances such as mortgages and long term leases, such that "[s]ubsequent purchasers are put on notice of this right," so requiring the artist to obtain the owner's consent would avoid situations like Carter "would avoid surprises for subsequent purchasers, and would allow all, including the artist, to make intelligent business decisions."

Zuckerman thought that a "chilling effect" would result absent such a requirement of specific consent. Clients would not install an art work in their building if there were a chance it would fall under VARA. Real property owners are afraid of litigation and lobbies are sometimes changed. Owners are "in the business of making money, attracting tenants to

their building." Thus, they want "the right to refurbish lobbies and other areas; restructure interiors of buildings." Without flexibility to make changes, "the marketability of their building would be impaired." Requiring an owner's specific consent prior to an art installation is the only way to solve the problem, in Zuckerman's view.

In regard to the work-for-hire issue in the Carter case, Zuckerman said it was "undisputed that the artists had an employment contract with the net lessee of the building pursuant to which they were paid weekly salaries. They received more benefits than I believe I have, and as a matter of fact, two of them filed for unemployment insurance after the net lessee filed for bankruptcy and surrendered the building," he said. The case was "the most clear cut aspect of work for hire that has ever been before the court." The issue in Carter was not whether "the copyright follows the work for hire," he claimed; "the work for hire analysis was applied in the past to determine who the copyright holder was." Zuckerman noted that VARA, which does not cover works-for-hire, nevertheless "says that the holder of the copyright is not necessarily the beneficiary of the VARA protection."

**John Koegel, Arts Attorney**

Koegel sat at the opposite end of the table from Zuckerman and Schwartz and announced that he was "at the other end of the spectrum" from them. As a solo practitioner for the past 13 years, he has exclusively represented "visual artists, and to some extent art galleries and other visual-art related entities." Before he became a solo practitioner, he was general counsel at the Museum of Modern Art in New York City.

Koegel commented that it was too early to adequately determine the effects of the waiver provision, but to date, he thought the effects have been "relatively little." He based his conclusion on the low level of awareness of VARA and the nature of art transactions.

Koegel the lack of awareness of VARA by attorneys was a "good thing" because without knowledge, they do not seek waivers. He does not raise the waiver issue and if the other side doesn't bring it up, waiver does not become part of the agreement.

Koegel explained that low VARA awareness also has two negative results, however. First it reduces the importance of VARA as "preventative medicine." Second, it adds to the likelihood that artists unaware of VARA will sign contracts without realizing that a waiver has been inserted.

Koegel has "always viewed this Act as a form of Congressional respect for art and artists, and if everybody understands that they are supposed to take good care of art, maybe they will." If people don't know about VARA it can't fulfill that function. Artists often do not consult attorneys before signing contracts, and may therefore waive their rights without even realizing it. On balance, however, Koegel felt that the low level of awareness "probably benefits the effectiveness of the Visual Artists Rights Act."

Next, Koegel discussed the effects of the VARA waiver provision. He has often "mused" why parties seek a waiver; since it is plainly stated in the Act, it is a "veritable invitation" for most lawyers to ask for one. Without a waiver provision in the act, it would not be sought as often. On balance he favored having it in the Act, however, since VARA requires a specific written waiver. The waiver provision was useful in litigation as a way to counter defendants who would otherwise claim that an oral waiver occurred.

Koegel next addressed the issue of whether artists contracts routinely provide for a waiver of moral rights. Art transactions are largely informal, he said. "The vast majority of transactions are sales that are frequently carried out by galleries or other types of dealers that hold works of art on consignment. Bills of sale are infrequent and even when they do exist, they are not negotiated and they do not contain waivers." VARA is not often directly addressed in typical art transactions.

Koegel noted that the Copyright Office should be concerned with commission situations, since those situations usually involve a written agreement. Commission agreements do not routinely provide for a waiver but it does happen "from time to time." The last two years have not shown any pattern for waiver requests, Koegel thought, but the Carter case would likely produce more waiver demands "in construction projects where a work of art will be incorporated into a structure." Koegel pointed out the good fortune of the artists in Carter in that the opposing party did not know about VARA and therefore did not ask for a waiver.

The value of a commission may be a factor in the decision to seek a waiver. "The bigger and the more valuable the work, the more aggressive the commissioning party is going to be in trying to gain all rights." In the case of a monumental work, it might be foreseeable that some injury or modification would occur. Koegel mentioned visual artist Judy Pfaff and her installation at the Great Hall at Redding Terminal in Philadelphia. He noted that the Pennsylvania Authority required Judy Pfaff to waive her moral rights in her commission agreement.



Koegel addressed the intersection of works made for hire and VARA. He noted that commission agreements may not seek a waiver, but may try to claim the work as a work made for hire. It has been easier for him to negotiate away a declaration that a work is a work for hire than it has been for him to win a negotiation over liability for injury or modification. Even if he loses the debate on work made for hire at the outset, the work still may not be a work made for hire under section 101, he noted. The work for hire approach is not used instead of trying to get a waiver under VARA, Koegel believed. Instead, it is simply an approach that some people take. He noted that if he can make sure a work is not declared as work made for hire, then he does not have to fight the issue of waiver.

Koegel discussed a pending case concerning artist Judy Pfaff and the Denver Art Museum. He noted that the Pfaff case was shocking for two reasons: "the way that a major art museum like the Denver Art Museum handled the work of art, a major work of art;" and "the way that this particular museum responded to Judy Pfaff after they destroyed her work." Pfaff was one of 13 artists invited to create a major installation. In most instances artists lose money in transactions with museums, but spend the extra time and effort in exchange for the exposure. In this case, Pfaff spent a good part of one year creating the work and one month installing it. The work was slated to travel to Columbus after exhibition in Denver. Pfaff had a written contract giving the Denver Art Museum responsibility for taking care of and disassembly her work, Koegel said, but in disassembling the work, the museum did not read the artist's detailed instructions, and the work ended up in Columbus in pieces. Since the work was destroyed, Pfaff spent an additional two weeks creating a new piece for the Columbus Art Museum "at even more of her own expense and to her own detriment."

Koegel said the situation was "shocking" to him because the museum refused to take responsibility. He noted that the case is in New York District Court. He wondered whether the provisions of VARA would become better known because museums will try to seek waivers before they borrow works in order to avoid being sued later.

In conclusion, Koegel noted that artists definitely have unequal bargaining power when dealing with established galleries and other organizations. "Their bargaining position stinks," he said. The larger the commission or more important the museum or exhibition, the less power artists have. Unequal bargaining power will be a continuing concern as the waiver provision is more frequently used.

Schwartz agreed with Koegel that if Carter had known about VARA when the leaseholder entered into their contract, "they would have demanded something." He said the agreement limited the art work to a duration of five years.<sup>1</sup> He explained, "[w]e would have wanted something, but we would have accepted that because it did not produce a long term obligation on the building."

Schwartz said that the waiver provision needs to be refined because otherwise, "[m]ore and more owners are going to be more and more restrictive." He noted that owners may find it easier not to commission art rather than be forced to keep a work in place for "40-60 years."

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<sup>1</sup> A 1991 Letter Agreement between Sig Management Company and the three Js provided:  
[A]nd we further agree that, even though the company owns the building and title to the art for five (5) years from the date hereof, there shall be no modifications made to your work without your prior approval (that is, approval of at least two of the three of you), such approval not to be unreasonably withheld.

Letter Agreement between Irwin B. Cohen, of Sig Management Company, and John Veronis, John Carter, and John Swing, of the three Js (Dec. 16, 1991) (subsequently renewed).

The Register stated that there would be an issue one painted wall since it is attached to the building. Schwartz agreed and noted that a friend of his commented, "All I wanted was beige." The Register noted the artists' earlier comments that, had they anticipated having the kind of problem that occurred, they would have created a very different type of work. Schwartz said that his argument was "not an art argument." The Register responded that she understood him. Schwartz added that while he used the term "owner," "it could be a mortgagee, who has a superior interest to the owner. The house you live in has a mortgage so it's that."

The Register said she was concerned that a greater burden will be placed on artists. She questioned where the burden should lie, especially in light of the fact that most artists' contracts are oral. She was concerned about asking artists to seek out the building owner and asked why the owner or relevant party did not create contractual provisions with the lessee or relevant party instead. Schwartz noted that the real estate owner would then become the "art police." Schwartz offered the example of an owner who is retired in Florida and simply collects the rent check on his property in New York once a month; to his surprise, when the tenant leaves and he retains the building, he finds an art installation.

The Register noted that artists have moral rights by international agreement and commented that many countries do not allow for waiver, and that the Copyright Office was evaluating which party should "bear that burden." Schwartz said "having an owner of property bear that burden is just one more thing an owner has to do."

Koegel remarked that the waiver is already in the law so that artists can waive their rights when doing business with real estate companies. He commented, "I didn't know this

was a forum for owners to come down here and tell you how hard off they are because they can't control their property."

Kretsinger noted that the hearings were meant in part to provide the Copyright Office with information regarding and recommended changes in the law. Thus, she felt both sides should be able to speak and express their concerns.

Koegel said he didn't think the Office needed to "feel sorry for owners of real property who always prepare leases, and can't watch what is happening with their net leases and can't put in their leases certain controls now that they know what the law is."

Zuckerman said that he "admire[d] Mr. Koegel's enthusiasm," but thought Koegel read VARA incorrectly. Zuckerman explained that he was advising his own clients to include in their leases a provision that prohibits tenants from allowing "any installation of art of any kind that could in any way constitute works of visual art that have any kind of protection pursuant to VARA in the space without the owner's consent." Zuckerman noted that the problem arises when there is a breach of the lease because, under VARA, the owner is then left without a remedy.

Zuckerman presented the example of an owner who rents a summer house to a man whose wife is a painter, and she paints a mural on one of the walls. The person renting the house leaves at some point, and when the owner returns, he or she cannot remove the mural under VARA. Regardless of any agreement between the owner and the husband, the owner is without a remedy under VARA once the mural had been painted. The husband may have to pay damages, but the owner could not remove the mural under the statute. Koegel

remarked that he "always thought money was a remedy for some reason." The Register pointed out that they were not really discussing an economic right.

Zuckerman noted that there are free speech issues which really did not come out in the case. One issue concerns a determination of whose free speech is involved, the artist's or the owner's. He said, for example, that lettering over the entryway to the lobby of the Queens warehouse spells out "start licking." An owner may or may not find it offensive, he said, but questioned whether an owner, not having agreed to it, must live with it.

Zuckerman next raised the issue of compliance with building codes and laws. He cited situations where sprinkler heads are covered up, exit signs need implementation, and fire stairs need opening or closing. Noting the problem of compliance with any laws enacted in the future that apply to the building where the art is located, he said that under VARA, owners "would have to incur various other expenses or it's very unclear how that would be treated."

The Register asked Koegel, as a representative of artists' interests how he thought VARA would be interpreted in light of such public policy, health or safety issues. Koegel said he believed a court would "give precedence to the governmental interest." He noted that Judge Edelstein reviewed all that and did not find a conflict. Judges determine such issues all the time. Koegel said artists are "very understanding in that regard and would work cooperatively with a municipality." He explained that he had put together contracts with sports arenas and others "where it is understood that there will be some movement in the future." The Register asked whether it is understood or whether the parties put it in the contract. Koegel responded that both parties usually address it in the contract. Language is

sometimes included that "contemplates the possibility that some changes will have to be made to address these sorts of issues."

McGreevy interjected two points. First, he noted that Zuckerman's statement on public safety assumed that VARA trumps health and safety laws. That, he said, has not been determined. In this case, artists worked closely with engineers and others in creating and installing the work. Second, he said artists would face difficulty in having to locate the owner of a building. He described the chain of parties involved in building ownership and lease in Carter and noted that the artists signed their contract with an entity called Sig Management Company, which represented itself as owner of the building. It would be very difficult for the artists to "go out and rummage through the archives, the New York city land records, and find out who the heck all these people are." He could not envision one of the artists calling Mr. Schwartz or Helmsley and asking to put in a 14,000 square foot installation, the type of problem that would occur if artists were required to obtain prior consent from owners.

Zuckerman argued that it would be easy to determine property ownership from the Clerk's office in New York, and that one can find recorded interests and mailing addresses of managing agents. To deprive an owner of a property interest for a lifetime is a taking without compensation. Zuckerman said in New York "there is a nexus of 50 years as being the sale of property," and that "it is taxable as a sale." The Register noted again that the constitutional issue of a taking is being evaluated in court.

Schwartz agreed with Koegel that artists shouldn't have to search for the building owner. The Register also agreed. Schwartz commented that "when it comes to reality and

practicality, if an owner is knowledgeable about this law and he wants art, he will do whatever he has to do to protect himself." Otherwise, an owner will avoid the situation and choose "a plain vanilla lobby;" such a recourse was not good for art but was the reality. Koegel commented that he represents artists and cares very much about art and does not think that will result. He said Schwartz's comment about owners choosing not to commission art represents the "standard pitch." Schwartz said there are many "plain vanilla lobbies" in Manhattan. The Register noted that it may have to do with money at some point. Koegel noted that he was not "cowed by the prediction that all owners of property are not going to deal with artists anymore." He said such a prediction deals only with art that cannot be removed and that the discussion was centering on "the littlest, remotest part of this whole law." Schwartz agreed. Koegel suggested that the discussion should shift to something else.

Kretsinger said she did not have any more questions about equal bargaining power, because she thought that topic had been addressed. She asked Zuckerman for a copy of the Real Estate Board's statement. Based on the discussion she was hearing, she thought the logical model was probably government contracts with negotiations about the work, site specific arrangements, and the expectations of each party. Although the Copyright Office would evaluate recommendations on the waiver provision and produce a report by December 1, 1995, Kretsinger noted that the waiver provision was not likely to be amended in the next few years. She therefore thought more open discussions were better.

Koegel said he was not advocating keeping moral rights quiet. Kretsinger said that she thought his comment was made "tongue in cheek." Koegel responded that "it really

wasn't tongue in cheek, it was just a statement of fact that over the last four years, the lack of awareness has benefitted artists." The Register agreed that "people who didn't know didn't seek waivers."

Kretsinger directed a question to a member of the attending public, Stephen Weil, director of the Hirshhorn Museum. She asked Weil whether "museums have some kind of insurance that would take care of a careless employee damaging a work." Weil responded, "[n]ormally, yes." Koegel said, however, there was a problem "when the insurance company gets involved, because they don't care about the artist." He noted that such a situation occurred in Denver and that the insurance company will string this case out for four years, saying "All the way down the line, they'll challenge the recognized quality of the work, whether or not Judy Pfaff is a well known artist. I mean they will do everything because I mean they don't care."

Douglass asked whether the witnesses had any contracts to give the Copyright Office. Koegel said he "grabbed two contracts on the way out" that he concluded recently, but couldn't leave them that day and would forward them to the Office. The Register told him he didn't have to because the Office had a few months. Koegel said one contract involved "MTV borrowing an artist's work to show on MTV, and they had a waiver in there, sort of silly, but they had it in there." Douglass said the Copyright Office would like to have the contract.

Douglass asked Schwartz and Zuckerman if they advocated the use of a waiver for future situations. Zuckerman responded, "We are recommending to our clients who are owners of real property when they lease space to tenants, to put in provisions prohibiting



tenants from installation of any art work whatsoever. To the extent they wish to have art work installed, we are recommending that they seek waivers . . . .” He noted that waivers would be sought from people “who do decorative type of work” and others besides artists.

Douglass asked whether Schwartz was opposed to artists rights under VARA, or if he felt that VARA needed to be “refined and focused.” Schwartz responded that the law should not allow an inferior interest to burden a superior interest. He remarked that, while he was not an attorney, he has learned in his 20 years in real estate that “you can’t grant a greater estate than you have. A tenant in space A in a building can’t sublease space B because he doesn’t have it to sublease.”

Douglass noted that commissioned works represent a small percentage of all art contracts, and asked Koegel if he agreed with an earlier statement that they are about one percent of all art contracts. Koegel responded that he would not agree with the remark if it meant to imply that commissioned works were an “insignificant part of the art market.” He noted that many artists accept commissions and some artists live off them. Kretsinger noted that the person who mentioned that percentage “meant that most sales are of movables” rather than to suggest that commissions are insignificant. Koegel reminded her that one “can have a commission of a moveable piece also.”

Speaking form the audience, George Koch of National Artists Equity Association said that the Copyright Office may want to look at the National Assembly of State Arts Agencies and Public Art Institute, which compiles numbers of commissioned works at the state and county levels. He noted that there are many transportation commissions, as well.

**Douglass** asked how the Copyright Office could increase awareness of VARA.

**Koegel** responded that it "happens through cases" and arts organizations.

**The Register** thanked all participants and encouraged submission of written comments and contracts by the end of July.

**The hearing** concluded.

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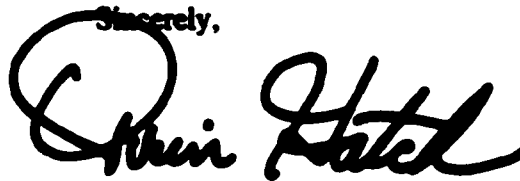
The Honorable Marybeth Peters  
Register of Copyrights  
U.S. Copyright Office  
Library of Congress  
Washington, D.C. 20540

Dear Ms. Peters:

I am writing in response to your recent request to extend to March 1, 1996, the deadline for delivery of the Copyright Office's report on the effect of the waiver provisions of the Visual Artists' Rights Act of 1990.

I am amenable to such an extension in light of the many responsibilities your office has undertaken during this unusually busy year. I appreciate your continued efforts and will look forward to receiving your report in March.

Sincerely,



Orrin G. Hatch  
Chairman

OGH:tdd

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November 27, 1995

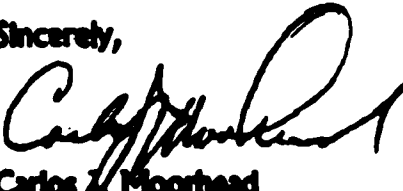
Ms. Marybeth Peters  
Register of Copyrights  
Library of Congress  
Department 17  
403 Madison Building  
Washington, D.C. 20540

Dear Ms. Peters:

Please be advised that I am in receipt of your letter of November 21, 1995 wherein you ask that the delivery date of the Copyright Office's Report on the effect of the waiver provisions of the Visual Artists' Rights Act of 1990 be redesignated as March 1, 1996 rather than December 1, 1995, the date specified in the enabling Act.

I understand and appreciate the many demands made upon your Office especially by your new responsibilities as a result of the recent abolition of the C.R.T and the rescheduling of a March 1 date is acceptable to me. Please keep me advised of your progress.

Sincerely,



Carlos Moorhead  
Chairman  
Subcommittee on Courts  
and Intellectual Property