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# The Visual Artists Rights Act

*by*

TIMOTHY M. CASEY*

## Table of Contents

I. Introduction to the VARA ................................ 86
II. The Berne Convention: Adherence at Last .............. 88
III. The VARA Provides Protection Where Existing Law Fails . 91
   A. Copyright ............................................ 91
   B. Doctrine of Waste .................................... 91
   C. Defamation ........................................... 92
   D. Unfair Competition .................................. 93
   E. Freedom to Contract ................................ 93
   F. Right to Privacy ...................................... 95
IV. Equal Footing: Uniformity Among States, Nations, and Professions ............................................ 95
V. Unresolved Issues ........................................ 98
   A. Film Excluded from the VARA ....................... 98
   B. Work for Hire ........................................ 100
   C. Specific Language .................................... 101
   D. Resale Royalties ..................................... 102
   E. Constitutional Issues ................................ 105
VI. Conclusion ............................................. 105

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Introduction

The Visual Artists Rights Act (VARA) of 1990 amends the copyright laws of the United States (U.S.) to protect the rights of visual artists. This legislation brought the U.S. into compliance with an important international copyright treaty, the Berne Convention, by granting moral rights which were previously not recognized by any legal doctrine in American law. The VARA created equality among artists in different states, nations, and disciplines. Although subject to minor shortcomings, the VARA demonstrates a commitment to the arts in this country by protecting the rights of artists.

I Introduction to the VARA

In 1986, two Australian entrepreneurs bought a Picasso drawing entitled “Trois Femmes” for $10,000. They cut the drawing into 500 one-inch square sections and sold each of the squares for $135 as an original Picasso. The enterprise went so well that one of the entrepreneurs remarked that the works of other masters would be purchased.

In 1968, William Smith painted a mural on a wall of the Maryland House, a historical monument in that state. Eighteen years later, Marriott Hotels purchased a concession stand in the building and hired an artist to paint over portions of the mural. When Smith found out about the completed changes, he considered his work desecrated. It had been: an appraisal put the value of the altered work at $70,000; the work had been worth $500,000 in its original state. Smith’s signature still remained on the work.

Kenneth Snelson spent two years creating a sculpture for the New York World’s Fair in 1964, his first important public showing. After the Fair, the purchaser of his sculpture, a scrap metal dealer, contacted Snelson to ask about the alloy used in the chunks of scrap which remained from Snelson’s award winning work.


5. Ossola, supra note 3, at 27.

Until recently, none of the above artists had any legal redress in this country. However, on December 1, 1990, President Bush signed legislation that included the VARA.7

The issue of artists' rights is not new. In the past, Congress considered measures to protect artists' interests.8 Senator Edward Kennedy introduced the VARA legislation several years ago, but it was rejected by the Senate Committee on the Judiciary.9 Indeed, this law may owe its very existence to the chicanery of the veteran Senator because Kennedy "quietly inserted" the VARA into the omnibus legislation enacted at the close of the 101st Congress.10 George C. Smith, Chief Minority Counsel for the Senate Judiciary Committee on Technology and the Law, called the passage of the VARA "Christmas tree" legislation.11 He commented that the measure passed "only because of its linkage . . . without so much as a word of debate or discussion."12

The new legislation extends the rights of a small class of visual artists. Those works covered include paintings, sculptures, lithograph prints in editions numbering 200 or less, and photographs taken for exhibition purposes only.13

The VARA extends the copyright laws to include "moral rights" of artists. Moral rights originated in France's "droit moral,"14 which included the following: (1) the right to create a work; (2) the right to publish a work; (3) the right to withdraw a published work from sale; (4) the right to prevent excessive criticism; (5) the right to prevent other violation of reputation; (6) the right of paternity; and (7) the right of integrity.15 Save the latter two, these rights have been limited or repealed in

7. VARA, supra note 1, at 5089.
9. Kennedy introduced the bill on August 6, 1987. S. 1619, 100th Cong., 1st Sess., 133 CONG. REC. 11,471-503 (1987). According to the history of the Senate bill in the Congressional Record, it has not cleared the Senate Committee on the Judiciary. It seems that it was slipped into the signed legislation.
12. Id.
13. VARA, supra note 1, at 5128.
15. Id. at 1540 n.5.
French law. The VARA grants only the right of paternity and the right of integrity to artists of "recognized stature."

The right of paternity recognizes that an author should be identified as the creator of a work. This right prevents the erroneous attribution of a work to another artist. The right of paternity also allows an author to deny authorship. For example, if an author feels that a work no longer reflects the author's artistic vision, then the author may prevent association of her name with the work. The right of integrity recognizes that an author should be empowered to prevent alterations or mutilations of a work. Under the VARA, an artist may prevent the mutilation, alteration or destruction of the work even when it is sold to another party. An artist may enjoin the destruction or mutilation if the change would "be prejudicial to his or her honor or reputation."

By granting the moral rights of paternity and integrity, Congress recognized that works of art are fundamentally different from other commodities, and that special protections should apply. Moral rights protect the link between the artist and the artwork by guaranteeing that an artist will only be associated with works which represent the creator's artistic vision.

II

The Berne Convention: Adherence at Last

In 1988, the U.S. adopted the Berne Convention for the Proliferation of Literature and Art. This reciprocal copyright treaty protects the works of authors internationally by allowing the copyrights of individuals in one member country to be recognized by all member countries. One provision specifically requires that each signatory recognize the moral rights of its authors. Although the U.S. was a member of the Berne Convention, moral rights of authors were not recognized prior to the passage of the VARA.

16. Id. at 1540.
17. VARA, supra note 1, at 5128.
18. Id. at 5129.
20. Id.
21. VARA, supra note 1, at 5128.
22. Id. at 5129.
Article 6 bis of the Berne Convention protects the moral rights of artists:

(I) Independently of the patrimonial rights of the author, and even after the assignment of said rights, the author retains the right to claim the paternity of the work, as well as the right to object to every deformation, mutilation or other modification of the said work, which may be prejudicial to his honor or to his reputation.

(II) It is left to the national legislation of each of the countries of the Union to establish the conditions for the exercise of these rights. The means for safeguarding them shall be regulated by the legislation of the country whose protection is claimed.²₅

By its membership in the Berne Convention, the U.S. ostensibly recognized moral rights. However, Congress refused to create moral rights legislation,²⁶ theorizing that U.S. law already protected the rights enumerated in the treaty through actions in defamation, privacy, unfair competition, copyright, and contract.

On previous occasions, Congress declined to join the Berne Convention.²⁷ Historically, large exploiters of creative works were opposed to extending the rights of artists through participation in the Berne Convention.²⁸ Recently, however, the dramatic increase in copyright piracy made the international protection provided by the Berne Convention attractive. One expert estimated the lost revenue from pirated works sold in foreign countries at $500 million annually.²⁹ Perhaps influenced by the specter of continuing losses from piracy, one exploiter of creative works, the Motion Picture Association of America (MPAA), supported joining the Berne Convention.³⁰ The MPAA was wary, however, of including moral rights as part of the adoption of the Berne Convention.³¹ The position of the MPAA was that the moral rights legislation was unnecessary. Commentators and recent testimony at the Senate Judiciary Subcommittee on Patents, Copyright, and Trademark hearings regarding adoption of the Berne Convention suggest that the MPAA opposes moral rights because they would reduce their control over films.³²

²⁵. Id.
²⁷. Roeder, supra note 8, at 558.
²⁸. Id. The MPAA represents major film studios which own and market films. Roeder noted the opposition of the motion picture producers and broadcasters to proposed legislation to join the Berne Convention. Id.
²⁹. Copyrights, Senate Subcommittee Hears Views on Berne Adherence Legislation, Daily Rep. for Executives, Mar. 4, 1988, (Regulation, Economics and Law), at 43. The article quotes David Brown, representative for the Motion Picture Association of America. Figures may be inflated because of Mr. Brown's advocacy, but presumably include only revenues lost from television and film piracy.
³⁰. Id.
³¹. Id.
³². Id.
moral rights would transfer control of films from the studios, which own the rights to the films, to the directors, who create the films.\textsuperscript{33}

Commentators have expressed the view that international organizations did not oppose U.S. accession to the Berne Convention because of the importance of U.S. membership.\textsuperscript{34} It is possible that the other members were willing to overlook the shortcomings of U.S. law in order to have the copyright interests in their works protected in the U.S.

Some members of Congress had trouble accepting the benefit of international copyright protection offered by the Berne Convention while simultaneously ignoring the duty to recognize moral rights domestically. Representative Howard L. Berman (D-Cal.), for example, stated, “I am troubled . . . that we may not be intellectually honest when we conclude that we can join Berne by deeming U.S. laws to be in compliance, but assuming none of the responsibilities under the Convention to enhance the rights of authors.”\textsuperscript{35}

Other scholars have observed that these same moral rights should have been guaranteed by U.S. adoption of the Universal Declaration of Human Rights.\textsuperscript{36} Article 22 of that document guarantees that every person is “entitled to realization, . . . and free development of his personality.”\textsuperscript{37} Article 27, paragraph 2, of the Universal Declaration of Human Rights also protects artists’ moral rights by providing that, “[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic protection of which he is the author.”\textsuperscript{38}

Prior to the passage of the VARA, the U.S. agreed to protect moral rights through its acceptance of the Berne Convention and the Universal Declaration of Human Rights. By signing these international treaties without protecting the moral rights of authors, the U.S. adopted inconsistent law.

\textsuperscript{33} See infra, notes 104-15 and accompanying text.
\textsuperscript{34} Copyrights, Senate Judiciary Committee Hears Debate on Visual Artists Moral Rights Bill, \textit{DAILY REP. FOR EXECUTIVES}, June 26, 1989, (Regulation, Economics and Law), at 121 (referring to the view of Edward Damich, Professor of Law, George Mason University).
\textsuperscript{37} Id. (quoting 217 U.N. GAOR at 75, U.N. Doc. A/810 (1948)).
\textsuperscript{38} Id. (quoting 217 U.N. GAOR at 76, U.N. Doc. A/810 (1948)).
III

The VARA Provides Protection Where Existing Law Fails

In joining the Berne Convention without extending the rights of authors, Congress believed that moral rights were already protected under existing U.S. law. The law of copyright, the doctrine of waste, defamation, unfair competition, contract law, and invasion of privacy have each been used to enhance the argument that moral rights legislation is not needed. These alternative legal theories fall short of the protection granted by the VARA. Only the VARA adequately protects moral rights.

A. Copyright

Traditionally, the law of copyright protected only the pecuniary interests of the creator. If this interest was assigned or waived, the artist had no other remedy under copyright law. Only the holder of the copyright could protect the pecuniary interest. One court held that “American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic rather than the personal rights of authors.” Copyright fails to adequately protect moral rights because copyright protection does not exist once the work is sold.

B. Doctrine of Waste

One commentator has proposed applying the property doctrine of waste to copyright law in order to insure that the work is not changed, mutilated, or destroyed. The artist, as grantor of the copyright, would retain a reversionary interest in the copyright until it was renewed. Therefore, if the holder of the copyright during those years altered or

41. Comment, supra note 14, at 1553.
42. Roeder, supra note 8, at 566.
43. Comment, supra note 14, at 1540-41.
44. Spielberg’s Lament; Berne Convention Copyright Changes, NEW REPUBLIC, Mar. 21, 1988, at 7.
46. Gilliam v. ABC, 538 F.2d 14, 24 (2d Cir. 1976).
47. Id.
48. Comment, supra note 14, at 1551-54.
destroyed the work, he would be liable to the original grantor because the changes interfered with the reversioner's right of enjoyment.49

This theory, however, would not protect the artists' rights. The 1976 revision to the Copyright Act gave the holder an interest to extend fifty years after death.50 Even under former law, which gave a renewable twenty-eight-year right,51 the original grantor did not necessarily retain a reversion, because the law required that the grantor file a registration.52 A legal reversion only occurs when the property right revests with the original owner automatically, with no action required by the reversioner.53 The registration requirement, therefore, might eliminate any reversionary interest which the grantor possessed.54 And even if such a requirement were ignored, the creator would be forced to wait until the first twenty-eight-year period expired before an action could be filed. Thus, the artist would have had no remedy because the "delaying of the moral right amounts to denial of it."55

C. Defamation

An action for defamation may be sustainable if the alteration or mutilation of the work damages the author's reputation by allowing others to attribute the changed work to him.56 "To deform his work is to present him to the public as the creator of a work not his own, and thus make him subject to criticism for work he has not done..."57 Upon a cursory examination, then, defamation protects the same interests protected by moral rights: the author's interest in being identified with his work.

There are problems, however, with guaranteeing moral rights through defamation. First, defamation law does not protect one aspect of moral rights, the right to develop a reputation. Although the courts have long recognized a legal interest in a reputation,58 no action for defamation can stand if there is no existing reputation to be harmed.59

49. Id. at 1552-53.
53. ROGER CUNNINGHAM ET AL., THE LAW OF PROPERTY 96 (1984). "The reversioner's right to possession accrues automatically, without the necessity of making an entry, bringing an action for possession, or giving notice of termination." Id.
54. Comment, supra note 14, at 1558.
55. Id.
56. Id. at 1548.
57. Roeder, supra note 8, at 569.
58. See, e.g., Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (N.Y. 1917) (holding that the reputation of a clothes designer was worthy of legal protection).
59. Comment, supra note 14, at 1550.
Second, defamation could only prevent changes to a work, and not the complete destruction of the work. No damage to the artist's reputation occurs if the work is destroyed and never shown.\textsuperscript{60} Third, a defamation action only survives for as long as the creator lives; there is no action for defamation post mortem.\textsuperscript{61} Finally, under a defamation theory, there would be no way to prevent the damage except by threat of a lawsuit, as injunctive relief is not generally granted under the law of defamation.\textsuperscript{62}

D. Unfair Competition

An action for unfair competition may lie if another person tried to pass off the author's work as his own, or if the work was created by altering the work of the original author.\textsuperscript{63} This action, however, like copyright protection, only protects the author's pecuniary interest.\textsuperscript{64} It does not, for example, allow the author to recover damages for emotional distress caused by the desecration of his work. Further, if the pecuniary interest is assigned, then only the assignee, not the author, is protected.\textsuperscript{65} Thus, the creator may not have standing for an action in unfair competition.

E. Freedom to Contract

The freedom to contract offers the broadest argument for the notion that United States law affords the equivalent of moral rights protection. Parties who want to protect the moral rights of an artist could include such provisions in a contract. However, this argument is flawed. First, an unequal bargaining position often prevents the artist from securing moral rights in a contract. Second, the courts have been reluctant to enforce such provisions even if an artist does bargain for them.

Many artists are not able to contract for their moral rights because they have little bargaining power.\textsuperscript{66} Courts have recognized that the relative bargaining position of the parties may affect the validity of the con-

\textsuperscript{60} Roeder, \textit{supra} note 8, at 569.
\textsuperscript{61} \textit{Id.} at 567.
\textsuperscript{62} Comment, \textit{supra} note 14, at 1555.
\textsuperscript{63} \textit{Id.} at 1541 n.9 (quoting Fisher v. Star Co., 132 N.E. 133, 139 (N.Y. App. Div.), \textit{cert. denied}, 257 U.S. 654 (1921)).
\textsuperscript{64} Roeder, \textit{supra} note 8, at 567.
\textsuperscript{65} \textit{Id.}\n\textsuperscript{66} Bruce Fein, \textit{Illusory Guarantee for Artistic Rights}, \textsc{Wash. Times}, Dec. 4, 1990, at G1 (small time artists waive rights because they have no bargaining power); Neil F. Siegel, \textit{The Resale Royalty Provisions of the Visual Artists' Rights Act: Their History and Theory}, 93 \textsc{Dick. L. Rev.} 1, 2 n.8 (1988) (artists lack bargaining power).
tract. Because the artist is usually in the weaker bargaining position, she cannot reasonably expect to secure a provision protecting her moral rights. In addition, at the time the contract is formed, the work is usually undervalued because the artist's avant garde visions have not yet gained popular appeal. Even if the work does depreciate after its sale, as is common, the artist still has the inferior bargaining position because at the time of the contract, the "value" of the work is unascertainable.

Surprisingly, the courts have denied protection to authors who are able to contract for their moral rights. In Vargas v. Esquire, Inc., the court implied a waiver of the right of paternity by the plaintiff. The plaintiff, Vargas, had drawn a sketch for Esquire magazine entitled, "The Varga Girl." The magazine printed the sketch with the name "The Esquire Girl," and without the author's signature or any other identifying marks. Despite Vargas' assumption that the work would be attributed to him, the contract was silent on the issue of placement of Vargas' name on the work. The Seventh Circuit Court of Appeals found that absent an express provision, the plaintiff had waived his right to paternity.

In Preminger v. Columbia Picture Corp., the contract provided that the filmmaker was to have "the right to make the final cutting and editing of the picture." The filmmaker sued when Columbia edited his film, "Anatomy of a Murder," for television without his permission. The court denied the plaintiff any recovery, holding that the terms "final cutting" and "editing" only applied to the theater version, and that the television rights were entirely separate. The court thus refused to enforce the terms dealing with moral rights, even though they were included within the contract.

67. See, e.g., Henningsen v. Bloomfield Motors, 161 A.2d 69 (N.J. 1960) (finding that the much stronger financial position of the auto dealer relative to the auto buyer amounted to a lack of choice in accepting the waivers included in a service agreement).
68. Fein, supra note 66, at G1.
69. Siegel, supra note 66, at 8.
70. Id. at 9.
71. Comment, supra note 14, at 1560.
72. 164 F.2d 522 (7th Cir. 1947), cert. denied, 335 U.S. 813 (1948).
73. 164 F.2d at 525-26.
74. Id. at 526.
76. 267 N.Y.S.2d at 596.
77. Id. at 598.
78. See, Comment, supra note 14, at 1557.
F. The Right to Privacy

The right of privacy protects the author from an "assault upon his own feelings." The protection of the author's reputation encompasses his work, but the courts have refused to allow prominent authors to assert their right to privacy as it relates to their work. The famous artist cannot protect his works from mutilation, alteration, or destruction based on a right to privacy claim because he has celebrity status. Arguably, a celebrity artist commands a strong contractual bargaining position, and can therefore protect works through contract law. But given the reluctance of courts to honor moral rights through contract law, this protection is inadequate. In addition, the advantageous bargaining position of the famous artist may only exist after the artist has an established reputation. Since this bargaining position exists only after a reputation has been established, there is no power to protect the specific works which elevate the artist to celebrity status.

Although each of the alternative legal doctrines discussed may in some instances provide the same or similar protection as moral rights, each is susceptible to circumstances rendering them useless. Moral rights legislation provides necessary protection for artists against attacks on their work.

IV
Equal Footing: Uniformity Among States, Nations, and Professions

The enactment of the VARA creates equality among artists in different states, nations, and professions by protecting the moral rights of artists. Although these protections had existed in Europe for decades, very few states had enacted moral rights legislation. In addition, protections afforded to creators of music, film, and literature had far outweighed the protections available to visual artists.

The VARA gives artists in the U.S. protections that their European counterparts have long enjoyed. Most European countries have upheld moral rights for many years. For example, in 1845, the French Tribunal Correctionnel held that a sculptor, Clesinger, had the right to institute criminal proceedings because of the mutilation of one of his works.

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79. Id. at 1548 (citing Warren & Brandeis, supra note 45, at 193).
80. Id. at 1549 (citing William L. Prosser, Privacy, 48 CAL. L. REV. 383, 398-401 (1960) (Prosser proposed the false light theory of privacy)).
Although the higher court refused to allow a criminal action to proceed, it intimated that a civil action would lie.3

Fundamental differences between European and American views of art affect the rights granted to artists. The continental countries interpret the art work as an extension of the artist’s personality and therefore inseparable from the artist.84 The value of the art is derived from the intrinsic part of the artist contained in his work.85 One case which arose simultaneously in the United States and in France, Shostakovich v. Twentieth Century Fox Films Corp.,86 and Societe Le Chant du Monde v. Societe Fox Europe et Societe Fox Americaine Twentieth Century,87 demonstrates the difference between the views of the U.S. and many continental countries.88 In this case, a film expressing anti-Soviet political views incorporated the music of certain Russian composers and used the names of the composers in the credit lines. The composers sued, alleging that they opposed the views expressed in the film and that use of their music was tantamount to their endorsement of those views.89 The French courts ruled that there was undoubtedly moral damage and ordered the film seized.90 The American courts, however, ruled that there was no invasion of privacy and therefore, no damage.91

Another example illustrates the dominance of property law in the American legal system. Artist Alfred Crimi painted a fresco in the Rutgers Presbyterian Church in New York City. In 1946, the church painted over it. Crimi sued to have the new paint removed from the fresco.92 The court ruled that after a work is sold an artist has no further interest in it.93

Works of art have been treated like any other commodity, in that legal rights only exist with rights of ownership. The exclusion of artists’ rights from American law may have derived from English law, and specifically from the puritanical influence on the English legal system.94 Indeed, at least one commentator blamed the lack of English artistic talent

83. Id. (citing Judgment of Apr. 6, 1850, Cour de Paris, Fr., D.P. 1852.2.159).
84. A further discussion of the differences among European countries follows.
85. Comment, supra note 14, at 1544-45.
88. Id. supra note 14, at 1544-45.
89. 80 N.Y.S.2d at 576-77.
91. 80 N.Y.S.2d at 577-78. The court did address the issue of moral rights, but refused to apply them. Id. at 578-79.
93. Id. at 815-16.
94. Rosen, supra note 36, at 180-81.
during a period of excellence by French, German, and Dutch painters on
the English legal system.\textsuperscript{95}

The VARA also eliminates problems caused by inconsistent state law. Prior to the passage of the VARA, several states passed their own moral rights legislation. California and New York were the first; Louisiana, Massachusetts, Maine, New Jersey, Pennsylvania, Rhode Island, New Mexico, and Connecticut followed.\textsuperscript{96} However, a lack of uniformity among the states made it easy to circumvent any one state's law. For example, a work altered in one state could easily be shown in another state. This left the creator with no way to prevent attribution of his name to the altered work.\textsuperscript{97} The VARA, however, eliminates this problem through uniform legislation applicable to all states.\textsuperscript{98}

Finally, the VARA equalizes protections available to artists of different mediums. The fundamental difference between a painter, a sculptor, or a lithographer and a musician, filmmaker, or a writer is production volume. The former group produces only one copy or a limited number of copies of the work. The latter group produces multiple exact copies. Authors and musicians, and to some extent filmmakers,\textsuperscript{99} collect royalties based on the number of copies sold. Because painters and sculptors rarely produce copies of their work, there is no royalty equivalent in the limited edition visual arts world.\textsuperscript{100} The copyright laws give more protection to works which are readily duplicated. The result is that although a visual artist's original work may be more valuable than a copy, the copies receive better protection than the original.\textsuperscript{101} By guaranteeing moral rights, the author's interest in the work is extended beyond the initial sale, thus protecting the author's interest in the original work.

In sum, the creation of moral rights legislation in the U.S. put visual artists in different states on equal footing. The VARA gave visual artists the same protections accorded to authors utilizing different mediums or residing in different nations. In addition, the VARA signifies a U.S. commitment to the arts by protecting artists' rights.

\textsuperscript{95} Id. at 180.
\textsuperscript{96} Patricia Klein Lerner, \textit{Painter Goes to the Mat Over Changes in His Artwork}, L.A. TIMES, Mar. 8, 1990, at B10 (San Diego County Ed.).
\textsuperscript{97} Id.
\textsuperscript{98} Vara, supra note 1, at 5128.
\textsuperscript{99} Through the sales of video cassettes, copies of the film are sold and filmmakers receive a royalty. See Siegel, supra note 66, at 9.
\textsuperscript{100} \textit{But see infra}, notes 133-160 and accompanying text.
\textsuperscript{101} Siegel, supra note 66, at 9.
V
Unresolved Issues

While the VARA accomplishes several crucial objectives, it leaves several issues unresolved as well. First, motion pictures were expressly exempted from the VARA. Second, the VARA avoids the copyright doctrine of "work for hire." Third, ambiguous language included in the VARA presents an opportunity for a governmental agency to define "art." And finally, the VARA does not include a specific provision for resale royalties.

A. Film Excluded from the VARA

The controversy surrounding the colorization of films highlighted the conflict between the view of art as property and the view of art as an extension of the author. When Ted Turner purchased a hoard of classic films and announced his plans to colorize them for use on television, divergent interests in the motion picture industry quickly drew sides. The studios and producers, who owned the copyrights to the films, argued that films were property and, as such, subject to the whims of the owner. The Director's Guild of America (DGA) and the Screen Actors' Guild took the opposite position and argued that since the films were works of art, the producers had no right to alter them.

The producers and studios emerged from this skirmish victorious, as the VARA does not cover films. Lobbying groups for both sides gathered in Washington. Woody Allen appropriately represented the Screen Actors' Guild; many of his films are in black and white for artistic effect. Steven Spielberg represented the DGA. The producers and studios emerged from this skirmish victorious, as the VARA does not cover films.

As the Preminger case illustrates, it is difficult for a director to guarantee that the work will not be altered, even when a written contract stipulates that the director is to have the right to make final cuts and edits. On the other hand, the guarantee of moral rights for filmmakers would insure that the work was shown as the artist created it. It is unfair

102. VARA, supra note 1, at 5128.
103. Id.
104. Spielberg's Lament; Berne Convention Copyright Changes, supra note 44, at 7.
105. Id.
107. Spielberg's Lament; Berne Convention Copyright Changes, supra note 44, at 7.
108. VARA, supra note 1, at 5128.
109. See supra notes 75-78 and accompanying text.
to subject the artist to criticism for work which she does not believe accurately represents her.

Without moral rights protections, films may be altered without the permission of the director. Yet, the altered work would still be attributed to the director. The director should have the opportunity to create a work in black and white if he chooses, without fear of a later colorization which would ruin the intended effects. One commentator asked rhetorically if the black and white Kansas scenes in “The Wizard of Oz” should be colorized.\footnote{110}

One critical difference between films and other visual works is that when films undergo alteration, the original may still exist. If a painting or sculpture is altered, then the work is lost forever. However, the reasons for moral rights apply just as strongly to the colorization process as to any other alteration of an art work. In both cases, the artist is injured because his work is displayed in a form which he did not create and his persona is assaulted through the mutilation of the work. The reputation of the artist may be adversely affected because the work, though altered, may still be attributed to him.

Arguments have been raised that the viewing public should be taken into account in areas such as the editing and colorizing of motion pictures for television.\footnote{111} Steven Spielberg adamantly replies that, “the creation of art is not a democratic process. The public has no right to vote on the artistic choices that go into filmmaking. The public has the right to accept or reject the result, but not to participate in the action.”\footnote{112}

For the moment, the MPAA has won again.\footnote{113} In a pyrrhic victory for the directors, films were recognized as worthy artistic creations, raising the status of filmmakers to that of artists. Congress recognized certain movies as national treasures, with the original version to be kept at the National Archives.\footnote{114} Each year, additional films may become eligible for inclusion, thus guaranteeing that they will be displayed in their original form.\footnote{115}

\footnote{110}{Kernan, supra note 3, at F1.}
\footnote{111}{Id.}
\footnote{112}{Id.}
\footnote{113}{The other victory was the passage of Berne without recognizing moral rights.}
\footnote{114}{Kathleen Silvassy, Congress Picks “Treasured” Movies. U.P.I., Sept. 20, 1989, available in LEXIS, Nexis Library, Wires File. The films were selected on the basis of importance to American culture and history. Included among the first 25 films were “Casablanca,” “Dr. Strangelove,” “High Noon,” “Mr. Smith Goes to Washington,” “On the Waterfront,” “Snow White and the Seven Dwarfs,” and “Star Wars.” Id.}
\footnote{115}{Id.}
B. Work for Hire

The VARA also avoids the traditional copyright doctrine of works for hire. The doctrine applies when an employee creates a copyrightable work: the copyright vests with the employer.116 Many artists work on a commission basis. They are not salaried, and do not receive employee benefits, but they may be considered employees for the purpose of assigning the copyright. Copyright laws protect the owner, not the artist. In effect, the artist ends up a triple loser: she has no copyright protection, no employment benefits (such as worker’s compensation and insurance), and no contract protection.117

The courts have attempted to mitigate the harshness of the traditional rule by injecting the concept of the independent contractor. In a recent case involving prints by artist Patrick Nagel, the Ninth Circuit Court of Appeals ruled that since the artist was an independent contractor, the works for hire doctrine did not apply,118 and the copyright for Nagel’s work did not transfer to the purchaser.119 A third party purchased prints from Nagel’s “employer” seeking to use them to make posters. The Nagel estate sued the purchaser to enjoin the creation of the posters on grounds that the copyright was never transferred to the “employer” because there was no employee status.120 The Ninth Circuit held that the copyright should remain with the estate.121

In perhaps the most publicized case involving works for hire, an artist created a sculpture for a non-profit charity.122 The charity organization arranged for an exhibition tour of the sculpture without the consent of the artist. The artist sued, alleging that the group had exploited his work without permission, and sought a share of the royalties. Each party argued for sole possession of the copyrights to the work.123 The District of Columbia Circuit Court of Appeals held that the artist and the charity must share in the copyright, but it did not rule on the requirements of a work for hire contract.124 However, the U.S. Supreme Court overturned the appellate court’s ruling. In an opinion by Justice

116. See Murray v. Gelderman, 566 F.2d 1307, 1309-10 (5th Cir. 1978) (the employer is the statutory author of the work); Yardley v. Houghton Mifflin Co., 108 F.2d 28, 31 (2d Cir. 1939) (the employee-creator is presumed to assign the copyright).
117. See supra notes 66-78 and accompanying text.
118. Dumas v. Gommerman, 865 F.2d 1093, 1102-03 (9th Cir. 1989).
119. Id. at 1105
120. Id. at 1105.
121. Id. at 1094; see also Suzanne Muchnic, The Multibillion-Dollar Face-Off, L.A. TIMES, Feb. 12, 1989, (Calendar), at 7.
123. Id. at 1488 n.4.
124. Id. at 1498.
Marshall, the Court ruled that sole ownership of the interest should be given to the artist because the employment contract made him an independent contractor, not an employee.\footnote{125}{490 U.S. 730, 732 (1988).}

A clearer standard of what constitutes work for hire needs to be enunciated by Congress. Presently, the exclusion of works for hire from the VARA provides a loophole through which artists’ rights may slip.

\section{Specific Language}

The wording of the VARA has been criticized and should be clarified. Ambiguities in the present statute allow courts to withhold protection from unpopular artists.

In order to recover, the plaintiff artist must first show that his “honor or reputation” was injured.\footnote{126}{VARA, supra note 1, at 5128.} This phrasing appears to invite examination of the artist’s personal life in order to ascertain his reputation and the extent of the harm to it. The VARA should be amended to allow only evidence of professional reputation and honor. The damage to the work, and not the lifestyle of the artist, should determine liability.

In addition, the work must be of “recognized stature.”\footnote{127}{VARA, supra note 1, at 5129.} This language is an invitation for a governmental definition of art.\footnote{128}{Siegel, supra note 66, at 17.} Foreseeably, a romantic and unrealistic classification of art would create two categories. One type of art would be deemed worthy of admiration and protected. On the other hand, popular art, which captures the public’s fancy only until the next fad, would not be deemed worthy of protection.\footnote{129}{Id. at 18.}

Any such classification may prove dangerous and may result in the destruction of valuable works. History shows that contemporary attitudes do not determine the future significance of a work of art. Many works now considered great were, in their time, dismissed as popular art. For example, the Impressionist movement, which shattered the dominant realist school in mid-nineteenth century Europe, was abhorred by most critics.\footnote{130}{Rosen, supra note 36, at 183-84.} The “Ash-Can School” artists were rejected by American critics.\footnote{131}{Siegel, supra note 66, at 5 n.26. The Ash-Can School describes a group of American painters who were active before the Second World War. Their works depicted immigrants in city slums in an attempt to raise the viewer’s consciousness. Rosen, supra note 36, at 184.} The works of these artists survive, while the works of the most “recognized” artists of each of those times do not.\footnote{132}{See Rosen, supra note 36, at 182-85; see also Siegel, supra note 66, at 4-9.} Care, there-
fore, should be taken to avoid a standardized definition of art for the application of the VARA.

D. Resale Royalties

Of all the provisions in the original draft of the VARA, none drew so much fervor as the resale royalties provision. A resale royalty is a payment made to the artist whenever the work is resold. This idea is not new. California has passed a Resale Royalties Act that has drawn criticism from all sides. France, Germany, Italy, and at least eleven other countries all have national resale royalties laws for visual artists. The VARA only calls for the National Endowment for the Arts (NEA) to study the feasibility and costs of such a system.

In California, a Resale Royalties Act has existed for almost fifteen years. Any art work that is sold for more than $1000 and for a gross profit is subject to a royalty of five percent of the purchase price, paid to the author. This provision has been criticized because the royalty payment could exceed the profit from the resale. For example, if a work were bought for $25,000 and sold for $26,000, the gross profit is only $1000, but the royalty due is $1300. By adversely affecting the profit from the resale of art, the Act discourages investment in art.

Art dealers argue that resale royalties help established and financially secure artists, but hurt those who need it most, the struggling, unknown artist. According to this view, the resale of works by known artists generates profits for the gallery, which enable the gallery to subsidize exhibits of lesser known artists. Revenue from such exhibits usually does not cover the costs of the exhibit. In addition, the dealers have argued that the Resale Royalties Act only affects those few artists who are financially well off, because typically only their work sells at a profit.

136. VARA, supra note 1, at 5132.
139. Warren, supra note 135, at 114.
140. Siegel, supra note 66, at 10-11.
141. Only .15% of all living artists have had a significant number of their works resold. Siegel, supra note 66, at 9. This statistic is from an empirical study, which did not include reproductions of the original works, such as posters or postcards. Id. at 9 n.44.
The arguments of the art dealers, however, are flawed. First, the typical royalty is small. A royalty of less than the amount of the sales tax is not likely to affect decisions regarding exhibits to be shown. The royalty is only significant when the prices are extremely high, and few galleries sell extravagant works.\(^\text{142}\)

Payment of resale royalties is inherently fair. The following example points out the dramatic inequities that can result without resale royalties. In 1958, collector Richard Scull purchased a Robert Rauschenberg painting, "Thaw," for $960. Fifteen years later, Scull resold the painting for $85,000. The artist did not receive any compensation.\(^\text{143}\) While some argue that Rauschenberg, and others like him, are not starving artists,\(^\text{144}\) the theory behind artists' rights supports granting resale royalty rights.

One French artist eloquently expressed this inequity: he published a sketch of two poor children peering into the window of an extravagant gallery. The caption read, "Look, they are selling one of Daddy’s paintings."\(^\text{145}\)

The origin of the resale royalty concept is France's "droit de suite."\(^\text{146}\) Other countries with some form of the "droit de suite" include Algeria, Belgium, Chile, Czechoslovakia, Germany, Italy, Luxembourg, Morocco, Portugal, Tunisia, Turkey, Uruguay, and Yugoslavia.\(^\text{147}\) The French theory regards these resale royalties as the artist's share in the exploitation of the work, equivalent to the royalty that a musician receives whenever his song is played. The French believe that the creator, whether musician or artist, should share in the exploitation of the work.\(^\text{148}\) The French equivalent of the American Society of Composers, Authors, and Publishers (ASCAP), the Societe de la Propriete Artistique des Dessins et Models (SPADEM), monitors each sale of art and distributes the royalty to the artist.\(^\text{149}\)

The royalty schemes in Italy and Germany rely upon a different theory than the one used in France. Their rationale holds that the value of

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142. Id. at 9.
144. Siegel, supra note 66, at 10-11.
147. Warren, supra note 135, at 120.
148. Id. at 115.
149. Id. at 119. See also Rosen, supra note 36, at 163. The French resale law allows the artist three percent of the gross sale price if the sale is for over 10,000 francs. Id.
the work is present when the work is created, but not realized until after the work is resold. The apparent increase in value has nothing to do with the buyer; the qualities which give the work value were always present, but were unrecognized.\footnote{Warren, \textit{supra} note 135, at 119.} Germany, like France, has a royalty schedule which is a flat percentage of the resale price.\footnote{\textit{Id.} at 118-19. German law allows a royalty of five percent when the work is resold for more than 100 marks. \textit{Id.}} Italy, however, uses a sliding scale whereby a greater increase in the resale price of a work results in a greater royalty percentage for the artist. The Italian model adheres more closely to the theory of intrinsic value. Since the artist is responsible for the increase in value, his benefits increase in proportion to the increase in the resale price of the work.\footnote{\textit{Id.} The royalty rate in Italy fluctuates between one percent and ten percent. \textit{Id.} at 120.}

The VARA does not provide for a resale royalty, but it does commission a study to determine the feasibility of such a royalty and its effect on the artistic community.\footnote{VARA, \textit{supra} note 1, at 5132.} Of the present schemes, the Italian system is best. The French, German, and California systems, incorporating a flat percentage of the resale price, are flawed because a royalty may exceed the profit of a resale. The French and German systems adequately protect the artist's interests, but the Italian system corresponds most closely to the theory of artists' rights by rewarding greater increases in resale price with higher royalty percentages to the artists.

The California Resale Royalties Act has come under attack on preemption grounds as well. In \textit{Morseburg v. Balyon},\footnote{621 F.2d 972 (9th Cir. 1980).} the defendant art dealer argued that the state royalties statute was preempted by the Copyright Act of 1976.\footnote{\textit{Id.} at 975.} The Ninth Circuit Court of Appeals upheld the trial court's ruling that the California act was not preempted by the federal act\footnote{Although the case was decided after the passage of the Copyright Revision of 1976, the case arose under the Copyright Act of 1909, so it was decided under that law. \textit{Id.} at 975. The Ninth Circuit was not persuaded that the royalty was an unconstitutional taking, violated the commerce clause, or impaired the freedom to contract. \textit{Id.} at 978-79.} because the Copyright Act only covered the first transfer of the work, and the resale royalty only applied to later transfers. Therefore, the two laws did not conflict.\footnote{\textit{Id.} at 978. \textit{See also} Lewis D. Solomon & Linda V. Crill, Comment, \textit{Federal and State Resale Royalty Legislation: "What Hath Art Wrought?",} 26 UCLA L. REV. 322, 338-40 (1978).}

Some commentators have suggested that a contrary holding is possible under the Copyright Revision Act of 1976.\footnote{Warren, \textit{supra} note 135, at 116.} Under section one of
the Act,159 state laws providing rights equivalent to the federal statute are specifically preempted. However, California case law holds otherwise.160 Therefore, the question remains whether there is preemption on resale royalties. Federal legislation is required to resolve any preemption problems which may arise.

E. Constitutional Issue

Some believe that, "A work of art is a piece of property, and you cannot restrict what people do with their own property without running into constitutional problems."161 This statement illustrates the misguided view that has restricted the proliferation of the arts in America. The time for the preoccupation with property rights has passed. Viewing art as property limits a work's value to the cost of the paints and pigments, the canvas and a few brushes; that is, the exogenous value of the raw materials consumed. Such a view refuses to recognize the cultural and aesthetic value of art.162

Concerns about limiting property rights amount to pernicious nonsense when subjected to analysis. Every property interest is limited in some way, and the inference that people can do whatever they wish with their property is untrue. Indeed, several areas of the law provide some, albeit incomplete, protection for the same interests protected by the VARA. Certainly, the recognized protections of copyright and defamation are permissible, and the extension of the copyright laws to include moral rights of artists is a logical progression.

VI

Conclusion

The reasons for the creation of the VARA are complementary. By granting moral rights, Congress recognized that works of art are fundamentally different from other goods produced; that the art work is a reflection of the artist's personality. Further, moral rights recognize that an artist's reputation is a valuable asset and deserving of protection. Finally, in recognizing the rights of artists, Congress gives life to an explicit purpose of the Constitution, "...To Promote the Progress of Science and useful Arts..."163

160. Morseburg v. Balyon, 621 F.2d 972 (9th Cir. 1980).
162. See Rosen, supra note 36, at 177.