
January 1995

Artists' Moral Rights: Controversy and the Visual Artists Rights Act

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Recommended Citation

Dana L. Burton, Comment, *Artists' Moral Rights: Controversy and the Visual Artists Rights Act*, 48 SMU L. REV. 639 (1995)
<https://scholar.smu.edu/smulr/vol48/iss3/6>

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ARTISTS' MORAL RIGHTS: CONTROVERSY AND THE VISUAL ARTISTS RIGHTS ACT*

Dana L. Burton

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If art is to nourish the roots of our culture, society must set the artist free to follow his vision wherever it takes him.

—John Fitzgerald Kennedy¹

I. INTRODUCTION

AFTER relinquishing a work of art's copyright, artists have generally been without recourse with respect to the fate of that work in the United States. Copyright law traditionally protects an artist's work from economic exploitation only. Many countries, most notably France, have recognized in their copyright laws *droit moral*, or moral rights, which are distinct from economic rights.² Moral rights are gener-

* This paper was chosen for entry in the 1994 Nathan Burkan Memorial National competition.

1. ASHTON APPLEWHITE ET AL., AND I QUOTE 288 (1992).

2. See, e.g., Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y 1 (1980); Christine L. Chinni, *Droit d'Auteur Versus the Economics of Copyright: Implications for American Law of Accession to the Berne Convention*, 14 W. NEW ENG. L. REV. 145 (1992); Jeff C. Schneider, Note, *Recently Enacted Federal Legislation Providing Moral Rights to Visual Artists: A Critical Analysis*, 43 FLA. L. REV. 101 (1991); see also ANDRÉ LUCAS &

ally considered to stay with the artist even after the economic rights are sold. The recognition of moral rights in the United States has been limited, with most protection being found outside of copyright law. The passage of the Visual Artists Rights Act of 1990 (VARA), however, expanded moral rights protection for at least a limited group of artists.

Part two of this paper will overview the protection of moral rights in copyright law, focusing particularly on VARA and pre-VARA United States case law. Part three will address some of the areas of VARA that are open to interpretation and controversy. While this paper does not purport to set forth all areas of controversy, three will be addressed: the political controversy still surrounding VARA; some of the interpretation issues that may arise; and the effect of VARA's waiver provision on the moral rights provided by VARA. The primary focus in part three will be on the waiver provision.

II. PROTECTION OF MORAL RIGHTS

A. BERNE CONVENTION

In 1988, the United States acceded to the Berne Convention for the Protection of Literary and Artistic Works.³ The Berne Convention Implementation Act of 1988⁴ (BCIA) was signed into law by President Reagan on October 31, 1988. The Berne Convention and the BCIA both became effective in the United States on March 1, 1989. The United States decision to join the Berne Convention was based in large part on the insufficiency of existing international copyright protection, the desire to increase international negotiating leverage, and the need to fight copyright piracy.⁵

The Berne Convention, in Article *6bis*,⁶ provides moral rights protection to all literary and artistic works. Article *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.⁷

Existing United States copyright law at the time of BCIA did not provide moral rights protection as required by article *6bis*, nor did BCIA provide

ROBERT PLAISANT, 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, France ch. (Melville B. Nimmer & Paul Edward Geller eds., 1994) (analyzing French copyright law and moral right protection).

3. Berne Convention for the Protection of Literary and Artistic Works, *opened for signature* Sept. 9, 1886 (last revised July 24, 1971), *reprinted in* WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (Paris Act, 1971) (1978) [hereinafter Berne Convention].

4. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended in scattered sections of 17 U.S.C.).

5. David M. Spector, *Implications of United States Adherence to the Berne Convention*, 17 AIPLA Q. J. 100, 105-06 (1989).

6. Berne Convention, *supra* note 3, art. *6bis*(1), at 41.

7. *Id.*

for moral rights protection. The language of article 6*bis* certainly appears to create an obstacle to United States compliance with the Berne Convention. Congress stressed, however, that the Berne Convention was not self-executing,⁸ and resolved the issue by claiming that United States law already complied with article 6*bis* protection of moral rights through existing state and federal law.⁹ The Committee on the Judiciary of the House of Representatives found that "existing law is sufficient to enable the United States to adhere to the Berne Convention, the implementing legislation is completely neutral on the issue of whether and how protection of the rights of paternity and integrity should develop in the future."¹⁰ Moreover, Senator Hatch stated that "while existing U.S. law satisfies U.S. obligations under article 6*bis* of Berne, our judicial system has consistently rejected causes of action denominated as 'moral rights' or arising under the moral rights doctrine."¹¹ Senator Hatch's self-contradictory statement suggests that Congress, in an effort to meet merely the letter of the Berne Convention, speciously bootstrapped moral rights protection into existing U.S. law.

B. VISUAL ARTISTS RIGHTS ACT OF 1990

Endeavors in Congress to protect an artist's moral rights began before¹² and continued after¹³ adoption of the Berne Convention. These efforts culminated in the Visual Artists Rights Act of 1990.¹⁴ Although commentators argue that VARA does not provide enough protection and does not bring the United States into full compliance with the Berne

8. S. REP. NO. 352, 100th Cong., 2d Sess. 30 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3706, 3735.

9. 134 CONG. REC. 28,302 (1988) (statement of Sen. DeConcini). Congress stated that:

This existing U.S. law includes various provisions of the Copyright Act and Lanham Act, various state statutes, and common law principles such as libel, defamation, misrepresentation, and unfair competition, which have been applied by courts to redress authors' invocation of the right to claim authorship or the right to object to distortion.

S. REP. NO. 352, 100th Cong., 2d Sess. 9-10 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3706, 3714-15. *See infra* notes 60-117 and accompanying text for a discussion of moral rights case law in the United States prior to VARA.

10. H.R. REP. NO. 609, 100th Cong., 2d Sess. 38-39 (1988).

11. 134 CONG. REC. 28,306 (1988) (statement of Sen. Hatch). Senator Hatch cited the cases of *Granz v. Harris*, 198 F.2d 585, 590-91 (2d Cir. 1952); *Vargas v. Esquire, Inc.*, 164 F.2d 522, 526 (7th Cir. 1947); *Geisel v. Poynter Products, Inc.*, 295 F. Supp. 331, 340 n.5 (S.D.N.Y. 1968); and *Shostakovich [sic] v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575 (Sup. Ct. 1948). *Id.* The Senator's statement on the status of moral rights protection in U.S. law was oversimplified and one-sided. *See infra* notes 60-117 and accompanying text. Furthermore, claiming that the U.S. complies with Article 6*bis* of Berne, while stating that the U.S. does not recognize the moral rights doctrine, is obviously incongruent.

12. H.R. REP. NO. 514, 101st Cong., 2d Sess. 8 (1990) *reprinted in* 1990 U.S.C.C.A.N. 6915, 6918. Bills attempting to protect artists' moral rights date back to 1979. *Id.*

13. The Visual Artists Rights Act of 1989 was introduced by Senator Kennedy and Representative Kastenmeier. *Id.* at 5-6, *reprinted in* 1990 U.S.C.C.A.N. at 6915-16.

14. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, §§ 601-10, 104 Stat. 5128 (1990) (codified in scattered sections of 17 U.S.C.) [hereinafter VARA].

Convention,¹⁵ it is generally acknowledged that VARA represents a big step towards protection of artists' moral rights.¹⁶ This is particularly true when the limited political clout of artists is considered.¹⁷

The protection provided by VARA does not encompass all literary and artistic works, as required by article 6*bis* of the Berne Convention.¹⁸ Instead, protection is limited to works of visual art and more specifically to works of 'fine art.'¹⁹ Many works that are certainly visual in nature but are not in the realm of fine art are specifically excluded as works of visual art.²⁰ VARA further excludes from moral rights protection works made for hire and works not subject to copyright protection.²¹

VARA provides the moral rights of attribution and integrity.²² The author of a work, even if not the copyright owner, retains these rights.²³ Joint authors are considered coowners of all rights conferred by the statute.²⁴ The moral rights for all works created after the effective date of VARA last for the life of the author, or if a joint work, for the life of the last surviving author.²⁵ The Berne Convention, however, clearly requires

15. See, e.g., 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, 996 (1990).

16. *Id.* at 947, 998.

17. *Id.* at 998.

18. *Id.* at 947.

19. 17 U.S.C. § 101 (Supp. V 1993). A 'work of visual art' is defined as:

(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 two hundred 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.

Id.

20. *Id.* The statute specifically excludes as a work of visual art:

(A)(i) 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;

(ii) any merchandizing item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) 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.

Id.

21. *Id.*

22. 17 U.S.C. § 106A (Supp. V 1993).

23. 17 U.S.C. § 106A(b) (Supp. V 1993).

24. *Id.*

25. 17 U.S.C. § 106A(d) (Supp. V 1993).

that moral rights last as long as economic rights,²⁶ which in the U.S. is generally fifty years.²⁷

The right of attribution enables an artist to claim authorship of his or her work,²⁸ to preclude the use of the artists' names as author if not the creator of the work,²⁹ and to disavow authorship of a work that has been distorted, mutilated or otherwise modified if prejudice to the author's honor or reputation would otherwise result.³⁰ The right of integrity enables an artist to prevent distortion, mutilation, or other modification of his or her work if done intentionally and if it would be prejudicial to the artist's honor or reputation.³¹ The prejudice intended by Congress was to the artist's professional, not personal, honor or reputation.³² Destruction of a work can be prevented by an artist only if the work is of recognized stature and the destruction is either intentional or grossly negligent.³³

There are several exceptions to the rights of integrity and attribution afforded by VARA. Modifications resulting from the passage of time or from the intrinsic nature of the materials used are not covered by the statute's right of integrity.³⁴ Moreover, acts performed during conservation or public presentation of a work are not destructions, distortions, mutilations, or other modifications under VARA's right of integrity unless the modification results from gross negligence.³⁵ The rights of attribution and integrity do not apply to reproduction, depiction, portrayal, or other use of an otherwise protected work when used in connection with those works specifically excluded from works of art under 17 U.S.C. Section 101 (A).³⁶

VARA further provides that the moral rights given the artist may not be transferred but may be waived.³⁷ Any waiver, however, must be express, in writing, and very specific as to the work and uses of that work

26. Berne Convention, *supra* note 3, art. 6*bis*. para. 2, at 43. The second paragraph of art. 6*bis* provides that:

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.

Id.

27. 17 U.S.C. § 302(a) (1988). Terms are different for anonymous works, pseudonymous works, and works for hire. 17 U.S.C. § 302(c) (1988).

28. 17 U.S.C. § 106A(1)(A) (Supp. V 1993).

29. 17 U.S.C. § 106A(1)(B) (Supp. V 1993).

30. 17 U.S.C. § 106A(2) (Supp. V 1993).

31. 17 U.S.C. § 106A(3)(A) (Supp. V 1993).

32. H.R. REP. NO. 514, 101st Cong., 2d Sess. 15 (1990) *reprinted in* 1990 U.S.C.C.A.N. 6915, 6925.

33. 17 U.S.C. § 106A(3)(B) (Supp. V 1993).

34. 17 U.S.C. § 106A(c)(1) (Supp. V 1993).

35. 17 U.S.C. § 106A(c)(2) (Supp. V 1993).

36. 17 U.S.C. § 106A(c)(3) (Supp. V 1993). *See supra* note 20 for the text of 17 U.S.C. § 101(A).

37. 17 U.S.C. § 106A(e) (Supp. V 1993).

which are waived.³⁸ A single author may waive the rights for all authors of a joint work.³⁹

VARA also provides a rather complicated set of rules governing removal of works from buildings.⁴⁰ If removal of a work will harm or in some way modify the work, the building owner is free to remove it only if the author agreed to the installation of the work on the building prior to the effective date of VARA or if the owner and the author agree in writing that future removal may harm or modify the work.⁴¹ In the case where removal is possible without damaging the work, the author's rights of integrity and attribution apply unless the building owner has made a diligent, good faith effort to notify the artist or if within 90 days of notification the artist does not remove or pay to remove the work.⁴² VARA further requires that the copyright office set up a recording system to facilitate notification.⁴³

"[A]ll legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art" are preempted by VARA.⁴⁴ "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."⁴⁵ This is not true for lawsuits begun before the effective date of the legislation.⁴⁶ Furthermore, any rights, legal or equitable, that are not equivalent to those of Section 106A⁴⁷ or which extend beyond the life of the author⁴⁸ are not preempted. Therefore, state common law and statutory protection of a work which is not covered by VARA, or of rights which are not provided by VARA, are not preempted.⁴⁹ The preemption provision can therefore result in greater or lesser protection for an artist's work depending on the state involved.⁵⁰ The purpose of this provision is, of course, to provide a uniform, national system of protection.⁵¹

Additional provisions of VARA provide the remedies available for infringement,⁵² address the effect of the fair use doctrine on an artist's

38. *Id.* See *infra* notes 200-85 and accompanying text for a discussion of the VARA waiver provision.

39. *Id.*

40. 17 U.S.C. § 113(d) (Supp. V 1993).

41. 17 U.S.C. § 113(d)(1) (Supp. V 1993).

42. 17 U.S.C. § 113(d)(2) (Supp. V 1993).

43. 17 U.S.C. § 113(d)(3) (Supp. V 1993).

44. 17 U.S.C. § 301(f)(1) (Supp. V 1993).

45. *Id.*

46. 17 U.S.C. § 301(f)(2)(A) (Supp. V 1993).

47. 17 U.S.C. § 301(f)(2)(B) (Supp. V 1993).

48. 17 U.S.C. § 301(f)(2)(C) (Supp. V 1993).

49. H.R. REP. NO. 514, 101st Cong., 2d Sess. 21 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6931.

50. See Joseph Zuber, *The Visual Artists Rights Act of 1990— What It Does, and What It Preempts*, 23 PAC. L.J. 445 (1992) (discussing the effects of the preemption provision, focusing especially on the California and New York statutes).

51. H.R. REP. NO. 514, 101st Cong., 2d Sess. 21 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6934.

52. VARA, *supra* note 14, § 606.

moral rights,⁵³ and provide for future studies required by the Copyright Office.⁵⁴ More specifically, an artist suing under Section 106A is generally entitled to the remedies normally provided in a copyright infringement case,⁵⁵ with the exception that criminal penalties are not available.⁵⁶ Moreover, Section 106A rights, like other copyright rights, are limited by the fair use doctrine.⁵⁷ Congress further required in VARA that the Copyright Office conduct studies on the waiver of rights provision of Section 106A⁵⁸ and a study of the feasibility of a resale royalty requirement.⁵⁹

C. PRE-VARA MORAL RIGHTS PROTECTION IN THE UNITED STATES

Although the concept of moral rights has been acknowledged in the United States for many years, case law on the subject is limited and courts have been reluctant to recognize artists' moral rights in their work. Legal theories used by artists in an effort to exact moral rights protection include copyright, the Lanham Act,⁶⁰ contract, unfair competition, defamation, and right to privacy.⁶¹ Some commentators have even suggested theories such as the doctrine of waste.⁶² These theories and cases are still important today, even after the passage of VARA, because many artistic works are not protected by VARA. Therefore, the only place for many artists to turn is still outside copyright law, particularly when the artist has not retained the copyright to the work. Most of these theories, however, have met with only limited success.

Courts have generally been disinclined to apply moral rights to an author's work. For example, in the 1948 case of *Shostakovich v. Twentieth Century-Fox Film Corp.*,⁶³ the court found that the use of the plaintiffs' uncopyrighted music in a film, although objectionable to the plaintiffs, was not a violation of the composers' moral rights.⁶⁴ The court did, however, acknowledge that "under the doctrine of Moral Right the court could in a proper case, prevent the use of a composition or work, in the public domain, in such a manner as would be violative of the author's

53. VARA, *supra* note 14, § 607.

54. VARA, *supra* note 14, § 608.

55. 17 U.S.C. § 501(a) (Supp. V 1993).

56. 17 U.S.C. § 506(f) (Supp. V 1993).

57. 17 U.S.C. § 107 (Supp. V 1993). The fair use doctrine provides that "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not in infringement of copyright." *Id.*

58. VARA, *supra* note 14, § 608(a). See *infra* notes 212-65 and accompanying text for discussion of the December 1, 1992 Interim Report of the Register of Copyrights.

59. VARA, *supra* note 14, § 608(b).

60. 15 U.S.C. § 1125(a) (Supp. V 1993).

61. See, e.g., Timothy M. Casey, Note, *The Visual Artists Rights Act*, 14 HASTINGS COMM. & ENT. L.J. 85 (1991).

62. *Id.*

63. 80 N.Y.S.2d 575 (Sup. Ct. 1948).

64. *Id.* at 578. The court reasoned that, since the music was used in undistorted form and the theme of the film did not concern the plaintiffs, moral rights were not implicated. *Id.*

rights."⁶⁵ The court went on to express its concern over the application of the doctrine and the undefined state of this right in the law.⁶⁶

The courts appear even less inclined today to acknowledge moral rights protection. The increased reluctance is illustrated in the 1989 case of *Paramount Pictures Corp. v. Video Broadcasting Systems, Inc.*⁶⁷ In *Paramount*, the court found that the defendant's placement of local advertisements on videocassettes containing plaintiff's films was not a violation of either copyright law⁶⁸ or the Lanham Act.⁶⁹ In addressing cases which had recognized an artist's moral rights,⁷⁰ the court opined that it was reluctant to extend those cases' holdings beyond their controlling facts because no express moral rights were recognized in statutory copyright law and moral rights development in United States courts had been slow.⁷¹ The court did at least suggest, however, that in limited cases moral rights might be an issue.⁷² This is evidenced by the court's statement that the case at hand was "not a case where the equities so obviously favor the copyright owner that the court must struggle with the notion of 'moral rights.'"⁷³

An artist's right to integrity in his or her work was recognized in the leading case of *Gilliam v. American Broadcasting Companies, Inc.*⁷⁴ The *Gilliam* court provided relief to the artists under theories of copyright⁷⁵ and Lanham Act⁷⁶ violations. The court clearly viewed the protection of an artist's work as important.⁷⁷ The court frankly acknowledged the failure of American copyright law in the protection of an artist's right to integrity in a work and referred to efforts made by courts to provide protection under alternate theories.⁷⁸ The court failed to acknowledge, how-

65. *Id.*

66. *Id.* at 579.

67. 724 F. Supp. 808 (D. Kan. 1989).

68. *Id.* at 821.

69. *Id.* at 819.

70. See *WGN Continental Broadcasting Co. v. United Video, Inc.*, 693 F.2d 622 (7th Cir. 1982); *Gilliam v. American Broadcasting Cos., Inc.*, 538 F.2d 14 (2d Cir. 1976); *National Bank of Commerce v. Shaklee Corp.*, 503 F. Supp. 533 (W.D. Tex. 1980).

71. *Paramount*, 724 F. Supp. at 819.

72. *Id.* at 820.

73. *Id.*

74. 538 F.2d 14 (2d Cir. 1976).

75. *Id.* at 23.

76. *Id.* at 25.

77. *Id.* at 23. The court stated:

Our resolution of these technical arguments serves to reinforce our initial inclination that the copyright law should be used to recognize the important role of the artist in our society and the need to encourage production and dissemination of artistic works by providing adequate legal protection for one who submits his or her work to the public.

Id.

78. *Id.* at 24. The court stated 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. Nevertheless, the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law cannot be reconciled

ever, the limited extent to which United States courts have actually provided protection.

In *Gilliam*, the British comedy group Monty Python sued the broadcast company ABC, requesting a preliminary injunction to restrain ABC from broadcasting edited versions of Monty Python's programs. ABC, in broadcasting a ninety minute special consisting of three thirty minute programs, cut twenty-four minutes of the artists' work in order to insert commercials and remove material they found to be offensive or obscene. The district court found that the removal resulted in an impairment of the work's integrity which resulted in a loss of the program's "iconoclastic verve."⁷⁹ The district court judge, however, provided only limited relief. With respect to the broadcast of a second special, the district court required that a disclaimer be broadcast during the second special stating that, because of the editing, the Monty Python group dissociated themselves from the program.⁸⁰ The court of appeals, however, ordered the issuance of a preliminary injunction against the rebroadcast of the programs, pending final resolution of the issues which they made clear could result in a permanent injunction.⁸¹

Time-Life Films provided the programs to ABC through an arrangement with the British Broadcasting Company (BBC). The Monty Python programs were originally written and performed for broadcast by the BBC. An agreement between Monty Python and the BBC provided a very detailed procedure for making alterations in the script before recording, but was silent with respect to alteration after the program had been recorded.⁸² The agreement further provided that Monty Python retained the copyright to the scripts.⁸³ Moreover, the BBC was allowed to license transmission of the programs in any overseas territory.⁸⁴

Since Monty Python retained the copyright to the scripts, they were able to maintain a cause of action under copyright law. The court stated that even if the BBC owned the copyright of the recorded program, it was a derivative work of the script and therefore limited to the novel additions made to the underlying work.⁸⁵ Therefore, even if the BBC had agreed to allow the editing, it could not convey any rights greater than it owned.⁸⁶ The court concluded "that unauthorized editing of the underly-

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 work by relying on theories outside the statutory law of copyright . . .

Id. (citations omitted).

79. *Id.* at 18. The court of appeals found that "the truncated 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.

80. *Id.*

81. *Id.* at 26.

82. *Id.* at 17 n.2.

83. *Id.* at 17.

84. *Id.*

85. *Id.* at 19-20.

86. *Id.* at 21.

ing work . . . would constitute an infringement of the copyright in that work similar to any other use of a work that exceeded the license granted by the proprietor of the copyright."⁸⁷ The court added that, although a small degree of editing might be allowable, the editing in this case was too extensive, particularly in view of the contractual provisions limiting the right to edit the scripts.⁸⁸

Monty Python was also successful under a Lanham Act section 43(a)⁸⁹ cause of action,⁹⁰ providing some hope to artists that have been unable to retain the copyright to their work. An analogous cause of action may be found in state unfair competition laws.⁹¹ The Lanham Act, although a trademark statute, "has been invoked to prevent misrepresentations that may injure plaintiff's business or personal reputation, even where no registered trademark is concerned."⁹² Therefore, the court reasoned that when an artist alleges that a distorted version of that artist's work has been presented to the public by a defendant, the artist is seeking "to redress the very rights sought to be protected by the Lanham Act [section 43(a)] . . . and should be recognized as stating a cause of action under that statute."⁹³ Although the Lanham Act may be used to provide protection to an artist, the fact that protection must be sought under a trademark statute illustrates a glaring gap in copyright law.

In *Zim v. Western Publishing Co.*⁹⁴ an author was successful in a claim against his publisher for unauthorized and wrongful appropriation⁹⁵ of his name when he had not approved revisions. The plaintiff brought a tort claim based on a common law right to privacy recognized in that jurisdiction.⁹⁶ The court stated that the use of Zim's name for commercial purposes was his to control⁹⁷ and acknowledged this as "the first form of the right of privacy to be recognized by the courts."⁹⁸ Zim was not successful, however, with respect to all of the works. The use of Zim's name was found to be tortious only when the use was in breach of contract.⁹⁹

Artist Alberto Vargas's lawsuit, involving drawings made under a contractual agreement for publication by *Esquire* magazine, was not success-

87. *Id.* at 21.

88. *Id.* at 23.

89. 15 U.S.C. § 1125(a) (Supp. V 1993).

90. *Gilliam*, 538 F.2d at 24-25.

91. *Id.* at 24.

92. *Id.* The current language of Lanham Act § 43 is codified at 15 U.S.C. § 1125(a)(1) (Supp. V 1993).

93. *Gilliam*, 538 F.2d at 24-25.

94. 573 F.2d 1318 (5th Cir. 1978). Judge Goldberg set forth the facts of the case in a rather clever and entertaining way, framing the case in terms of the story of the earth's creation from Genesis. *Id.* at 1320-21.

95. *Id.* at 1326.

96. *Id.* The jurisdiction in *Zim* was Florida which recognized a common law right to privacy in *Cason v. Baskin*, 20 So. 2d 243 (Fla. 1944). *Id.*

97. *Id.* at 1327.

98. *Id.*

99. *Id.*

ful.¹⁰⁰ Vargas attempted to advance three theories: an implied agreement between the parties,¹⁰¹ moral rights,¹⁰² and misrepresentation and unfair competition.¹⁰³ The court flatly rejected all three theories. The court refused to imply a condition to the contract, finding that Vargas contractually relinquished all interests in the drawings and the names associated with the drawings.¹⁰⁴ The concept of moral rights was summarily rejected by the court:

What plaintiff in reality seeks is a change in the law of this country to conform to that of certain other countries. We need not stop to inquire whether such a change, if desirable, is a matter for the legislative or judicial branch of the government; in any event, we are not disposed to make any new law in this respect.¹⁰⁵

The plaintiff fared no better with his misrepresentation and unfair competition claims. The court again relied on the contract to hold that the artist had given up all rights with respect to the drawings.¹⁰⁶

The approach in *Vargas*¹⁰⁷ was followed by a New York court when the mural painter Alfred D. Crimi attempted to seek relief when a church unceremoniously painted over his fresco, which they had commissioned eight years earlier.¹⁰⁸ The plaintiff asserted that, based on the custom and usage of the trade, the work would "not be altered, mutilated, obliterated or destroyed."¹⁰⁹ The court determined that the mural was part of the real estate of the church.¹¹⁰ Therefore, based on real property law, any interest that arose by custom and usage must be in writing.¹¹¹ Crimi further asserted that he maintained a limited proprietary interest in the work after its sale "to the extent reasonably necessary to the protection of his honor and reputation as an artist."¹¹² The court rejected Crimi's arguments, holding that an artist does not retain any rights, with respect

100. *Vargas v. Esquire, Inc.*, 164 F.2d 522 (7th Cir. 1947). Esquire had contracted with the artist to provide drawings which were published under the title of 'Varga Girls' and bore the name of the plaintiff. After expiration of the contract the drawings were reproduced under the title 'The Esquire Girl' and the artist's name was omitted. *Id.* at 524.

101. *Id.* at 525.

102. *Id.* at 526.

103. *Id.*

104. *Id.*

105. *Id.* The court's attitude towards moral rights protection is clear from the beginning of their discussion of the issue. The court begins:

Plaintiff advances another theory which needs little discussion. It is predicated upon the contention that there is a distinction between the economic rights of an author capable of assignment and what are called 'moral rights' of the author, said to be those necessary for the protection of his honor and integrity. These so-called 'moral rights,' so we are informed, are recognized by the civil law of certain foreign countries.

Id.

106. *Id.* at 526-27.

107. 164 F.2d 522 (7th Cir. 1947).

108. *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S.2d 813, 815 (Sup. Ct. 1949).

109. *Id.* at 816.

110. *Id.* at 819.

111. *Id.*

112. *Id.* at 816.

to his artistic reputation, when a work is unconditionally sold.¹¹³ The court made clear that if an artist wants to retain any rights in his work, the rights must be reserved by the terms of the contract.¹¹⁴ Adding insult to injury, the court further opined that, even if Berne Convention moral rights applied in the United States, "[t]he right to prevent deformation does not include the right to prevent destruction."¹¹⁵ As a result of this decision, an artistic creation was forced to lie unseen under a coat of drab wall paint.

Perusal of the above discussed and similar cases reveals a common denominator. The artists who were afforded some relief either owned the copyright to the work or had contractual provisions which provided protection. Although some courts have acknowledged the existence of other causes of action, they seem reluctant to rely strictly on such alternate methods of protection, instead looking for more traditional contract protection. Even in *Gilliam v. American Broadcasting Cos., Inc.*¹¹⁶ where the court's language was very supportive of moral rights protection for artists, the court ultimately relied on the contract and Monty Python's ownership of the copyright.

Moreover, of the above discussed cases only *Crimi*¹¹⁷ would qualify for protection under VARA. Most of the cases in this area involve writers, musicians, or film and movie personnel, none of whom are afforded any protection under VARA. The reasons why there are not more cases involving works of 'fine art' are not clear. Is it because most creators of 'fine art' are not in the position to afford litigation, or do these artists just not have the bargaining power to negotiate contracts that protect their interests, or do they just not experience the same problems as artists in other areas do? These are not questions that are easily answered. One thing is clear—many artists must still depend on common law, state statutory law and federal law outside of copyright law to assert any rights to attribution or integrity in their work.

D. CASE LAW UNDER VARA

Case law interpreting VARA is minimal. There appear to be only three published cases where VARA was asserted. In *Gegenhuber v. Hystopolis Productions, Inc.*¹¹⁸ the defendant claimed preemption of plaintiffs' state law claims based on VARA. The works in question, plaintiffs' contributions to a puppet show, were held not protected works under VARA.¹¹⁹ The court opined that if Congress had intended to cover works such as sets, puppets, and costumes Congress would have included them in VARA, particularly in view of the extensive nature of the defini-

113. *Id.* at 819.

114. *Id.*

115. *Id.* at 816.

116. 538 F.2d 14 (2d Cir. 1976).

117. 89 N.Y.S.2d 813 (Sup. Ct. 1949).

118. No. 92 C 1055, 1992 WL 168836 (N.D. Ill. July 13, 1992).

119. *Id.* at *4.

tion of visual art in VARA.¹²⁰ Because plaintiffs' claim to a right of attribution was not covered by VARA, the state law claims asserted by plaintiffs were not preempted.¹²¹

In *Moncada v. Rubin-Spangle Gallery, Inc.*¹²² the plaintiff painted a wall mural on a building with the permission of the tenant. One of the defendants, an owner of a gallery directly across from the painted wall, supervised an employee painting over the wall the day after the mural was completed. The plaintiff endeavored to videotape the act, and the defendant attempted to stop him. Plaintiff claimed a violation of VARA, conversion, malicious assault, and interference with copyright. The only ruling made regarding the case was on a motion to dismiss the third party complaint against the gallery's insurance company.¹²³ While Mr. Moncada may have had a potentially successful VARA claim, a court will never address the merits because the case settled.¹²⁴

The U.S. District Court for the Southern District of New York recently took the first substantive look at VARA.¹²⁵ The case involved an ongoing sculptural work installed in a building lobby. The sculptors sued the managing agent and the owner of the building after the sculptors had been ordered to leave the building, and defendants' agent suggested that the sculptural work would be altered or removed.

The plaintiffs entered into a contract with the managing agent of the buildings's tenant in December 1991 to design sculpture for the building lobby. On March 31, 1994 the tenant's lease was terminated. Defendant Helmsley-Spear, Inc. became managing agent of the building on April 6, 1994 and barred the plaintiffs from the property on April 7, 1994.

The plaintiff's primary claim was violation of VARA.¹²⁶ The defendants responded by alleging that the sculpture at issue was not protected by VARA because: (1) the work was not a covered work of visual art;¹²⁷ (2) the work was a work made for hire;¹²⁸ (3) the plaintiffs' honor or reputation would not be prejudiced by distortion, mutilation, or modification of the work;¹²⁹ and (4) the work was not of recognized stature and

120. *Id.* at *4. The plaintiffs did not claim authorship rights in the play. *Id.* at *5 n.5. Instead the plaintiffs claimed creative contribution rights to the puppet show, including performance, design, construction, and production contributions. *Id.* at *2. The court further opined that the performance of the puppet show was not included under VARA's coverage by its plain language. *Id.* at *4.

121. *Id.* at *5.

122. 835 F. Supp. 747 (S.D.N.Y. 1993).

123. *Id.* at 750. The court determined that the insurance company was not liable for the occurrence, therefore they had no duty to defend the action for the defendant. *Id.*

124. Telephone interview with Paul H. Appel, Attorney for plaintiff (Feb. 17, 1994). Mr. Appel stated that the case had been settled. The merits of the case were not discussed. The opinions regarding the merits are attributable to the author.

125. *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303 (S.D.N.Y. 1994).

126. *Id.* at 313. Plaintiffs also unsuccessfully claimed copyright infringement, tortious interference with contract, and unlawful ejection from real property. *Id.* at 331-34.

127. *Id.* at 314.

128. *Id.* at 316.

129. *Id.* at 324.

therefore could be destroyed.¹³⁰ The defendants further argued that if VARA protected the work at issue, the result would be an unconstitutional taking under the Fifth Amendment.¹³¹ The court, trying the case without a jury, addressed each issue in turn.¹³²

The defendants first argued that the plaintiffs' work was not entitled to the protection provided by VARA. Specifically, the defendants alleged that the work incorporated elements of applied art.¹³³ The court found, however, that as a whole the work was not applied art.¹³⁴ Based on legislative history and the language of VARA, the court opined that VARA does not prohibit protection for "works of visual art that incorporated elements of, rather than constitute, applied art."¹³⁵

In their effort to remove plaintiffs' work from VARA protection, defendants further alleged that, because plaintiffs' were employees, the work was a "work made for hire."¹³⁶ A work made within the scope of employment by an employee is a "work made for hire" under the definition provided in the Copyright Act.¹³⁷ Moreover, a "work made for hire" is specifically excluded from protection of VARA.¹³⁸ Therefore, if plaintiffs were employees their work is outside VARA protection. After weighing the relevant factors, however, the court found that the plaintiffs' work was not a "work made for hire."¹³⁹

Because the court found plaintiffs' work to be a work of visual art within the coverage of VARA, it next analyzed whether VARA protected the work from modification, distortion, or mutilation under the statute.¹⁴⁰ Under VARA the work is protected from "intentional distortion, mutilation, or . . . modification" only if such action "would be prejudicial to [the plaintiffs'] honor or reputation."¹⁴¹ Because the statute does not define "prejudicial," "honor," or "reputation," the court looked to the well-es-

130. *Id.* at 326.

131. *Id.* Defendants also unsuccessfully counterclaimed alleging waste. *Id.* at 334-35.

132. The court first looked at the work to determine if it was a single work of art or several works of art which must be treated individually under VARA. *Id.* at 314. Judge Edelstein found that, except for "the 'building directory,' the 'entrance steps 31st Street entrance,' and [most of] the ceiling and wall lighting," the plaintiffs' work was a single work of art. *Id.* at 315.

133. *Id.* at 315. Applied art involves two-dimensional and three-dimensional "ornamentation or decoration" attached to utilitarian objects. *Id.* While the Copyright Act provides no definition of applied art, it is excluded from VARA protection. See 17 U.S.C. § 101 (Supp. V 1993).

134. *Carter*, 861 F. Supp. at 316.

135. *Id.* at 315.

136. *Id.* at 316.

137. 17 U.S.C. § 101 (Supp. V 1993).

138. *Id.*

139. *Carter*, 861 F. Supp. at 322. Analysis of the factors relevant for determining if a work is a "work made for hire" is beyond the scope of this comment. The factors were enumerated in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). The weight to be given these factors was addressed in *Aymes v. Bonelli*, 980 F.2d 857 (2d Cir. 1992). *Carter* provides a good discussion of *Reid*, *Aymes*, and the "work made for hire" factors. *Carter*, 861 F. Supp. at 316-22.

140. *Id.* at 323-24.

141. 17 U.S.C. § 106A(a)(3)(A) (Supp. V 1993).

tablished principle of statutory construction that the plain meaning of words should apply unless the result is clearly outside the intent of Congress.¹⁴² Accordingly, the court interpreted the statutory language to require determination of "whether such alteration would cause injury or damage to plaintiffs' good name, public esteem, or reputation in the artistic community."¹⁴³ Moreover, relying on legislative history, the court stated that there is no requirement "that the artists' reputation be derived independently of the art work that is the subject of this dispute."¹⁴⁴ After establishment of the required standard, analysis of the prejudice to an artist's honor or reputation ultimately came down to a battle of credibility and experts.¹⁴⁵ The court weighed the evidence and held that plaintiffs' honor and reputation would be damaged if the work was distorted, mutilated or modified.¹⁴⁶

The court next looked to whether the work was protected from destruction under the statute.¹⁴⁷ For protection from destruction under VARA, a work must be of "recognized stature."¹⁴⁸ As with previously discussed terms used in the statute, VARA does not define the term "recognized stature." Based on the "preservative goal" of the statute, the court looked at this requirement as a "gate-keeping mechanism," used in part to avoid nuisance suits.¹⁴⁹ In light of the purpose and plain meaning of this section of the statute, the court found that "a plaintiff must make a two-tiered showing: (1) that the visual art is question has 'stature,' i.e. is viewed as meritorious, and (2) that this stature is 'recognized' by art experts, other members of the artistic community, or by some cross-section of society."¹⁵⁰ The court stressed, however, that a plaintiff need not establish that the work is of a stature equal to artists such as "Picasso, Chagall, or Giacometti."¹⁵¹ Success on the recognized stature requirement, much like the prejudice to honor or reputation requirement discussed above, depends essentially on expert witnesses and credibility. After analyzing testimony on the issue, the court held that the work was a work of recognized stature.¹⁵²

Defendants also argued that VARA was unconstitutional if it protected plaintiffs' work.¹⁵³ In defendants' view, VARA affords third party control and permanent occupancy of their property, constituting an impermissible taking under the Fifth Amendment. Noting that congressional statutes are presumed to be constitutional, the court makes clear that the

142. *Carter*, 861 F. Supp. at 323.

143. *Id.*

144. *Id.* (citing H.R. REP. NO. 101-514, 101st Cong., 2d Sess. 15 (1990), reprinted in 1990 U.S.C.A.N. at 6925).

145. *Id.* at 323-24.

146. *Id.* at 324.

147. *Id.* at 324-26.

148. 17 U.S.C. § 106A(a)(3)(B) (Supp. V 1993).

149. *Carter*, 861 F. Supp. at 325.

150. *Id.*

151. *Id.*

152. *Id.* at 325-26.

153. *Id.* at 327.

defendant faces a heavy burden in this argument. The court found defendants' constitutional claim meritless.¹⁵⁴ In so finding, the court provided many reasons why VARA is constitutional including: VARA applies only to works installed after the statute's effective date; property value is not necessarily diminished and may be enhanced by VARA protection of a work on that property; any impact is temporary since VARA protection is in effect only for the lifespan of the last surviving artist of a covered work; and VARA is formulated to advance the public interest.¹⁵⁵

The plaintiffs requested an injunction, damages, costs, and attorneys' fees. The court held that plaintiffs were entitled to an injunction to prevent distortion, mutilation, modification, or destruction of the work.¹⁵⁶ The work also could not be removed from the building since portions would be destroyed if removed.¹⁵⁷ Plaintiffs were not entitled, however, to complete or continue creating the work.¹⁵⁸ Moreover, since no violation of VARA rights had yet occurred, plaintiffs could not recover damages on their claim. Additionally, the court found, in its discretion, that awarding costs and attorney's fees would be inappropriate in this case.¹⁵⁹

Presently, the meaning of VARA and the extent of its protection are unclear. Many unanswered questions remain. As the case law develops, interpretation of VARA should answer questions and resolve controversies. Of course, new controversies will almost certainly be identified during this interpretive process.

III. CONTROVERSY AND VARA

A. OVERVIEW

Controversy over moral rights continues to rage in the context of VARA. The controversies range from practical considerations, such as exactly what the meaning or effect of a provision of the law will be, to political issues raised by those who are against the law and/or its expansion. Practical concerns over VARA include the meaning of certain words and phrases in the law¹⁶⁰ and the potential effect of the waiver provision on the rights afforded by VARA.¹⁶¹ Those whose interests

154. *Id.* at 329.

155. *Id.* at 328.

156. *Id.* at 329.

157. *Id.* A work of visual art incorporated into a building after the effective date of VARA can not be removed if to do so would result in the "destruction, mutilation, distortion, or other modification of the work," unless such removal is agreed to in writing by the building owner and the artist. 17 U.S.C. § 113(d)(1) (Supp. V 1993).

158. *Carter*, 861 F. Supp. at 325.

159. *Id.* at 330. *Carter* is presently on appeal to the Second Circuit. Oral arguments were heard on March 15, 1995. This will be the first appellate court to address VARA. Quite possibly, however, the court may look at the somewhat unusual "work made for hire" issue and never reach the more substantive VARA holdings of the district court. David Goldberg & Robert J. Bernstein, *Visual Artists' Moral Rights Headed for Second Circuit*, N.Y.L.J., Jan. 20, 1995, at 3.

160. See *infra* notes 191-99 and accompanying text.

161. See *supra* notes 37-39 and accompanying text. See *infra* notes 200-85 and accompanying text.

would be harmed by expansion of moral rights to other artistic areas remain vocal on the subject and continue to point out the limited coverage intended by VARA.¹⁶² Others lament the passage of VARA as erroneous on grounds such as private property and First Amendment free speech rights.¹⁶³ As is often true, and aptly suggested by a commentator, "it is where moral and economic rights clash that the most intense controversy erupts."¹⁶⁴

Commentators who support moral rights protection for artists are generally in favor of expansion of these rights beyond the narrow confines of VARA.¹⁶⁵ It has been suggested, however, that the political and economic realities that led to the exclusion of all but a limited group of works from VARA make it unlikely that moral rights protection will be expanded to those excluded works.¹⁶⁶ This is evidenced by the congressional debates over colorization of motion pictures.¹⁶⁷ One commentator submits, however, that "greater rights with respect to works that do have substantial economic potential is precisely what authors need [in order] to bargain more effectively with those who package and disseminate their works."¹⁶⁸

Commentators urge that both artists and the public are benefitted by the preservation of works of art.¹⁶⁹ Furthermore, VARA represents a huge step into an arena much more common to Europe and unique to the concepts of property law traditionally followed in the United States.¹⁷⁰ Close scrutiny of the effects of VARA will be required to determine if this is an isolated law or a stepping stone for the extension of moral rights protection to a broader group of artists.¹⁷¹ Many commentators are optimistic, at least cautiously, about the future of moral rights protection for artistic works in the United States.¹⁷² For example, John B. Koegel, a

162. See Michael R. Klipper & John B. Glicksman, *Berne Measure Doesn't Incorporate New Moral Rights Into U.S. Law*, *Legal Times*, Dec. 24, 1990, at 19. The authors represent the Committee for America's Copyright Community (CACC). The CACC opposes comprehensive moral rights legislation, but took no position on VARA. A broad range of producers of copyrighted materials, including but not limited to printed materials, computer software, motion pictures, broadcasting, sound recordings, and educational testing are represented by CACC. The CACC also responded to the Copyright Office Request for Information on the Waiver Provision of VARA. Instead of providing information useful to the study, however, they urged the Copyright Office to properly focus on the narrow area of art covered by VARA. See *infra* notes 176-84 and accompanying text.

163. See George C. Smith, *Artistic License Takes On A New Meaning*, *LEGAL TIMES*, Dec. 17, 1990, at 23.

164. Charles D. Ossola, *Law for Art's Sake*, *LEGAL TIMES*, Dec. 10, 1990, at 27, 29.

165. *Id.* at 27; Damich, *supra* note 15, at 996.

166. Ossola, *supra* note 164, at 27.

167. *Id.* at 27. See, e.g., H.R. 2400, 100th Cong., 1st Sess. (1987); Michael C. Penn, *Colorization of Films: Painting a Moustache on the "Mona Lisa"?*, 58 U. CIN. L. REV. 1023 (1990); Michael B. Landau, *The Colorization of Black-and-White Motion Pictures: A Grey Area in the Law*, 22 LOY. L.A. L. REV. 1161 (1989).

168. Ossola, *supra* note 164, at 27.

169. *Id.* at 29. See also John H. Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339 (1989).

170. Ossola, *supra* note 164, at 29.

171. *Id.*

172. *Id.*; see also Damich, *supra* note 15, at 996.

practitioner and witness before the subcommittee hearing on H.R. 2690,¹⁷³ believes that eventually moral rights protection will be expanded to include other works of art.¹⁷⁴ Other commentators, however, believe that moral rights will not and should not extend past their present state.¹⁷⁵

B. POLITICAL CONTROVERSY

In responding to commentary of Charles D. Ossola,¹⁷⁶ representatives of the Committee for America's Copyright Community (CACC) took the opportunity to state their views on the extension of moral rights beyond VARA.¹⁷⁷ They first suggest that Mr. Ossola implied that VARA was enacted in order to comply with the Berne Convention moral rights requirements.¹⁷⁸ In response, the CACC representatives emphasize Congress's implementation of the Berne Convention. Specifically, they point out that Congress stated that existing laws, both state and federal, satisfied article 6*bis* of the Berne Convention, and that United States law did not recognize moral rights before or after the Berne Convention was implemented.¹⁷⁹ The CACC representatives further state that the reason for the limitations on the works covered was not political influence of industries dealing with copyrightable products but instead was the nature of the work involved.¹⁸⁰ Specifically cited is the irreplaceable nature of a one of a kind work, such as those protected by VARA, contrasted to the multiple copies of works such as books, movies, and records, and the often collaborative efforts involved in many of the unprotected works.¹⁸¹ The authors further suggest that the reason for the concerns of Congress and the limitations provided in VARA is regard for the objective of the U.S. Constitution's copyright clause, "ensuring public availability of a broad array of intellectual and artistic works."¹⁸² The position is taken by the CACC, with respect to the future expansion of moral rights protection in the United States, that Congress made clear in the enactment of BCIA and VARA that their intention was not to extend these rights in the future.¹⁸³ Furthermore, they state that the public interest will be

173. H.R. 2690, 101st Cong., 2d Sess. (1990).

174. Telephone Interview with John B. Koegel, Esq. (Jan. 3, 1994).

175. See Klipper & Glicksman, *supra* note 162, at 19.

176. See Ossola, *supra* note 164.

177. See Klipper & Glicksman, *supra* note 162.

178. *Id.* at 19.

179. *Id.* at 19. The incongruence of these positions, however, emphasizes the political fictions under which Congress sometimes operates. See *supra* notes 9-11 and accompanying text.

180. Klipper & Glicksman, *supra* note 162, at 19.

181. *Id.*

182. *Id.* Although there is certainly merit in the differences suggested by the CACC representatives and, moreover, there are potential concerns created by these differences, it is unlikely that the political influence and economic concerns of the large industries involved have not affected the actions of Congress.

183. *Id.* This may be somewhat of an overstatement with respect to Congress's intent when implementing the Berne Convention. While Senator Hatch stated that moral rights causes of action had been rejected previously in the United States, the Committee on the

harmd by "unduly restricting the free flow of works currently produced by America's vital copyright system."¹⁸⁴

While the CACC addressed the expansion of moral rights to other areas in responding to Mr. Ossola's commentary, George C. Smith, chief minority counsel for the Senate Judiciary Subcommittee on Technology and the Law, addresses the inappropriateness of the law.¹⁸⁵ Mr. Smith raises two primary objections to VARA, the effect on private property rights and the effect on First Amendment free speech rights. Mr. Smith's commentary first urges that VARA creates an extreme property rights realignment with respect to the works protected.¹⁸⁶ Moreover, the American public is presumably going to be saddled with mountains of unwanted art work.¹⁸⁷

Mr. Smith further suggests that VARA restrictions are an assault on free speech akin to that of the rejected flag protection amendment.¹⁸⁸ The commentary urges that an individual should be able to buy a work which they consider, for example, pornographic, and destroy it as a political statement in the same manner that flag burning is permissible as an expression of free speech.¹⁸⁹ In closing, Mr. Smith expresses his belief

Judiciary of the House of Representatives made clear that the Berne Convention Implementation Act was neutral regarding the future of moral rights development in the United States. See *supra* notes 9-11.

184. Klipper & Glicksman, *supra* note 162, at 19.

185. Smith, *supra* note 163. See Ossola, *supra* note 164; see Klipper & Glicksman, *supra* note 162.

186. Smith, *supra* note 163, at 23.

187. *Id.* Mr. Smith states that "the attics and basements of America would soon be overflowing with unwanted 'art' . . ." if all works were protected from destruction. *Id.* at 24. "Even with the ban on destruction limited to works of recognized stature, disposing of unwanted art will remain a legally risky business." *Id.* Mr. Smith further submits that a tacky frame might be considered a prejudicial modification by a temperamental artist. *Id.* The commentary states that the "millions of ordinary Americans whose rights are now restricted are not likely to share the enthusiasm [of the arts community advocates]." *Id.* The situations presented by Mr. Smith are extreme. It is unlikely that ordinary Americans, who find themselves in the position to obtain an original work of art covered by VARA, are going to choose works they find offensive or that they want to modify in some way. Moreover, if a person does have a work of unwanted art and is unable to sell or donate it, the work can simply be returned to the artist. A person who would prefer to destroy or mutilate a work is probably only being spiteful and the artist arguably has an interest in preserving the work in light of its personal nature. It is also highly unlikely that a court would entertain a claim that a tacky frame is prejudicial to the artist's honor and reputation. Although Mr. Smith's claim that VARA is a dramatic departure from traditional property law concepts in the United States is true, the fears he raises are arguably of little concern to most American citizens. Moreover, some commentators believe the general public is benefitted by the preservation of works of art. See Merryman, *supra* note 169, at 363.

188. Smith, *supra* note 163, at 23.

189. *Id.* Mr. Smith suggests that many Americans would find it odd that they could burn the flag but not an offensive artwork. *Id.* There are some, however, who would find this analogy unconvincing. The ability to burn the flag of one's country in protest, although disturbing at some level to most, is considered a cornerstone of the freedom that Americans cherish. Buying a piece of privately developed artwork simply to destroy it as a statement against the artist or the work generally does not rise to the same level. Moreover, the work is a personal statement by the artist who certainly has at least as much right to that expression as the person who wants to destroy his or her work.

that "[t]he bizarre irony of this legislative handiwork was entirely lost on members of the 101st Congress."¹⁹⁰

C. INTERPRETATION ISSUES

The provisions of VARA have left much open to interpretation by the courts. For example, the statute provides protection of an artist's work by creating a right to "prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation."¹⁹¹ The statute fails, however, to define what is required for an act to be intentional or what qualifies as prejudice to an artist's honor or reputation.¹⁹² It is unclear whether a person must intend to prejudice the artist's honor or reputation or only intend to alter the work.¹⁹³ Moreover, the statute provides no guidance on what is required to prove intent or prejudice.¹⁹⁴

VARA protects a work from destruction only if it is of recognized stature.¹⁹⁵ The same problem arises in the definition and proof of recognized stature as arises with regard to prejudice to an artist's honor and reputation.¹⁹⁶ The problem intensifies when the issues are put to a jury.¹⁹⁷ The average layperson juror is not going to be able to determine what is prejudice to an artist's honor or reputation or what a work of recognized stature is in light of the inevitable disagreement of art experts.¹⁹⁸

The provisions of VARA discussed above are probably not the only provisions subject to interpretation. They are, however, central to the rights provided by VARA. Therefore, the analysis of just a few key provisions illustrates that the most basic rights provided by VARA will be undefined until courts shape and define the meanings and requirements of these and other provisions of VARA.¹⁹⁹

D. WAIVER

A waiver under VARA must be express, in writing, and specifically indicate the work and uses of the work which are waived.²⁰⁰ A primary area of apprehension regarding VARA's waiver provision is caused by the lack of bargaining power of most artists, which may result in exploitation of the artist.²⁰¹ The primary argument in favor of the waiver provi-

190. *Id.*

191. 17 U.S.C. § 106A(a)(3)(A) (Supp. V 1993).

192. Bruce Fein, *Illusory Guarantee for Artistic Rights*, WASH. TIMES, Dec. 4, 1990, at G1.

193. *Id.*

194. *Id.*

195. 17 U.S.C. § 106A(a)(3)(B) (Supp. V 1993).

196. Fein, *supra* note 192, at G1. Smith, *supra* note 163, at 23.

197. Fein, *supra* note 192, at G1.

198. *Id.*

199. See *supra* notes 125-59 for a discussion of *Carter v. Helmsley-Spear, Inc.*, the only published case addressing substantive VARA issues.

200. 17 U.S.C. § 106A(e) (Supp. V 1993).

201. Request for Information, 57 Fed. Reg. 24,659, 24,661 (1992).

sion is grounded in common law freedom of contract notions.²⁰² The public interest in the preservation of works of art is also relevant in the analysis of the waiver provision.²⁰³

Congress recognized the concerns surrounding the waiver provision from the provision's inception.²⁰⁴ The legislature understood the potentially weak bargaining position of the artist and the possibility that the law will be eviscerated by the adoption of routine waivers.²⁰⁵ Although the potential danger of the waiver provision is recognized, Congress believed that prohibiting waivers would constrain ordinary practices of commerce.²⁰⁶ Professor Jane C. Ginsburg testified before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice that the best protection for moral rights would be to proscribe waivers.²⁰⁷ Professor Ginsburg suggests that prohibiting waiver, however, would probably be too drastic for the United States legal system and is not required by the Berne Convention.²⁰⁸ Moreover, Professor Ginsburg further testified that "despite their formal prohibition *de facto* waivers are likely to occur. The artist is better protected under a regime requiring a specificity of waivers than under one where an ideologically pure no-waiver law is rarely in fact observed."²⁰⁹

Because the waiver provision of VARA is an area of concern, the U.S. Copyright Office is in the process of conducting a study on the waiver of moral rights provided by VARA.²¹⁰ The study and a final report are to be complete by December 1, 1995.²¹¹ An interim report was provided on December 1, 1992.²¹²

The Copyright Office published a Request for Information on June 10, 1992, in which they provided background of the United States adherence to the Berne Convention, background of VARA, explanation of the waiver concerns, and specific questions to which they were seeking answers.²¹³ The first three questions requested input on how and where information should be gathered in the continuing study.²¹⁴ Eleven ques-

202. *Id.* Although unwaivable moral rights protection would be paternalistic, Congress generally appears more and more willing to be paternalistic in the laws it provides. Contract matters, however, are an area where legislatures and courts are reluctant to interfere unless the inequality in bargaining power and the resulting exchange is egregious.

203. *Id.* See also Merryman, *supra* note 169.

204. H.R. REP. NO. 514, 101st Cong., 2d Sess. 18 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6928.

205. *Id.*

206. *Id.*

207. *Id.* Professor Jane C. Ginsburg is from the Columbia University School of Law.

208. *Id.*

209. *Id.*

210. In VARA, *supra* note 14, § 608(a)(1), Congress required the Copyright Office to do a study on the waiver of rights provision. See *supra* note 58.

211. VARA, *supra* note 14, § 608(a)(2).

212. REGISTER OF COPYRIGHTS, WAIVER OF MORAL RIGHTS IN VISUAL ARTWORKS-INTERIM REPORT (1992). VARA, *supra* note 14, § 608(a)(2), requires a progress report not later than two years after the enactment of VARA.

213. Request for Information, 57 Fed. Reg. 24,659 (1992).

214. *Id.* at 24,661-662.

tions were presented dealing specifically with the issue of waivers in contracts with artists.²¹⁵ These questions were very detailed and if answered would give a great deal of insight into the effects of VARA's waiver provision. Unfortunately only seven sets of comments were received in response to the Copyright Office's request.²¹⁶ While the responses do provide useful information, the questions asked by the Copyright Office remain essentially unanswered. The responses of the seven parties, however, are set out below as they provide the most comprehensive source to date of information on VARA's controversial waiver provision.

The Nebraska Arts Council (NAC) explicitly focused on the questions presented by the Request for Information.²¹⁷ They suggest that artists' awareness and reactions to VARA vary dramatically, as is probably the case with most segments of American society that are affected by legislation. Some artists are highly knowledgeable of VARA while others know nothing of it. The range of reactions runs the gamut from indifference to intense response.²¹⁸ The NAC supports a survey of artists if it involves a large cross-section of artists from a diverse selection of areas in order to

215. *Id.* The following questions were asked by the Copyright Office:

1. What constitutes relative equivalence of bargaining power? Do even well-known artists inherently have unequal bargaining power in dealing [sic] with established museums and other organizations?
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 to integrity? Are waivers given for artistic work to be incorporated in buildings proportionately greater than waivers for other works?
6. In what kind 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 [sic] 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 provisions prohibiting authors from waiving their artists' rights?
11. Do public contracts differ in the extent or nature of waivers offered in contracts with artists?

Id.

216. REGISTER OF COPYRIGHTS, *supra* note 212, at 7. The text of the report contains a synopsis of the responses and Appendix 2 contains the actual comments received by the seven parties.

217. *Id.* at 7 & app. 2, NAC comments at 1.

218. *Id.* at 7-8 & app. 2, NAC comments at 1.

accurately represent all of the artists of the United States.²¹⁹ They further suggest that data from foreign countries would not be useful as it would not have any significant effect on the legislature or the courts in this country.²²⁰

The NAC also responded to the questions relating to artists' contracts and waiver provision in these contracts.²²¹ They suggest that well known artists are in a much better bargaining position, with respect to contract negotiations, than lesser known or unknown artists. Therefore, since it is riskier to buy the work of a lesser known or unknown artist, these artists are more likely to have to waive their VARA rights in order to sell their works.²²²

The remaining questions were answered by the NAC in the context of contracts acquiring art under the state's Percent for Art Program.²²³ Contracts between the NAC and artists do not provide for a waiver of an artists VARA rights. Moreover, the work is very specifically identified in the contracts used by the NAC. The contracts leave all rights provided under federal copyright law, except possession and ownership, in the artist.²²⁴ The artist is not allowed to make reproductions of the work; however, the NAC reserves a license to reproduce the work for noncommercial purposes as long as it is done "in a tasteful and professional manner, and the artist is duly credited"²²⁵

The BG-WC Arts Commission, Capital Arts Center (CAC) of Bowling Green, Kentucky offered the opinion that the waiver should not be used unscrupulously as bargaining leverage.²²⁶ Artists should be able to make their own choices without being pressured to waive rights.²²⁷ The CAC representative, however, implies that the law should not be used to protect an artist from his or her own bad judgment.²²⁸

The Art-in-Architecture Program (Program) of the General Service Administration (GSA) in Washington, D.C. responded to the Copyright Office's Request for Information with details concerning their treatment of moral rights in contracts with artists.²²⁹ The contract presently used by

219. *Id.* at 8 & app. 2, NAC comments at 1.

220. *Id.*

221. *See supra* note 215.

222. *Id.* The NAC's views on the contractual bargaining power of artists are based on informal discussions with artists in Nebraska. *Id.* at app. 2, NAC comments at 2.

223. *Id.* at 8 & app. 2, NAC comments at 2-3. The Nebraska Percent for Arts Program purchases a work for an intended site for the purpose of the work becoming a modification to or permanent part of a structure. *Id.* at 7 & app. 2, NAC comments at 2. The art is not acquired for commercial purposes. Any profits derived from the sale of items such as postcards that contain reproductions of the artwork are handled as they would be for a nonprofit organization. *Id.* at app. 2, NAC comments at 2-3.

224. *Id.* at 8 & app. 2, NAC comments at 2.

225. *Id.* at 8 & app. 2, NAC comments at 2.

226. REGISTER OF COPYRIGHTS, *supra* note 212, at 9 & app. 2, CAC comments at 1.

227. *Id.*

228. *Id.* at app. 2, CAC comments at 1.

229. *Id.* at 10 & app. 2, GSA comments at 1. The GSA's Art-in Architecture Program commissions works nationwide for federal buildings. *Id.*

the GSA provides rights of attribution and integrity to the artist.²³⁰ The policies and procedures of the Program are presently in the process of revision in order to reflect VARA.²³¹ Detailed questions on the waiver of VARA rights are difficult for the GSA to answer until they implement a waiver option in their contracts with artists.²³² They do make clear, however, that any waiver they utilize would be knowingly made.²³³ The GSA is also considering a waiting period of five years after installation of a work before it could be removed or relocated, except under limited circumstances.²³⁴ Moreover, the GSA expects to follow a detailed procedure before a work could be removed.²³⁵

The Committee for America's Copyright Community (CACC) also responded to the Copyright Office's Request for Information.²³⁶ Instead of providing information on their experience with waivers or answering the questions posed by the Copyright Office, the CACC reiterated their position that moral rights should not be expanded beyond the limited scope of VARA.²³⁷ Therefore, they recommended that the Copyright Office limit the scope of its study to the visual works of art covered under VARA.²³⁸ They further warn that any broader study violates the edicts of Congress.²³⁹

A survey of artists was conducted by the Volunteer Lawyers for the Arts of Massachusetts, Inc. (VLA of MA).²⁴⁰ Most artists surveyed had little or no experience with waiver provisions.²⁴¹ The VLA of MA suggests that it is presently unclear whether artists' lack of experience with waiver provisions is because VARA is so new and its impact is not yet known, or because written contracts are rare for the artists covered by

230. *Id.* The GSA agrees to attribution of the work to the artist at the site of the work and in any references made to the work by the GSA. They further agree to inspect the work yearly for proper labeling and damage. *Id.* at app. 2, GSA comments at 1. The work becomes governmental property but the artist retains the copyright to the work. Government permission is required, however, before the artist can exhibit or reproduce the work. *Id.* at 10 at app. 2, GSA comments at 1.

231. *Id.* at 10 at app. 2, GSA comments at 1.

232. *Id.*

233. *Id.*

234. *Id.* at app. 2, GSA comments at 2. The GSA suggests that waiver of the five year guideline would be permissible if conservation or preservation of the work were involved or if safety risks were at issue. *Id.*

235. *Id.* This provision, if adopted, would provide a sort of procedural due process protection for the work.

236. REGISTER OF COPYRIGHTS, *supra* note 212, at 11 & app. 2, CACC comments. See *supra* notes 176-84 and accompanying text for additional information regarding the interests represented by the CACC and their positions with respect to moral rights and VARA.

237. REGISTER OF COPYRIGHTS, *supra* note 212, at 11 & app. 2, CACC comments at 1.

238. *Id.* at 11 & app. 2, CACC comments at 1-2.

239. *Id.* at 11 & app. 2, CACC comments at 3.

240. *Id.* at 12 & app. 2, VLA of MA comments at 1. VLA of MA is "a non-profit organization established to provide access to legal services, and advocacy, for artists and non-profit cultural organizations." *Id.* The artists surveyed were "well established, working artists with local and regional reputations." *Id.* at app. 2, VLA of MA comments at 1. Approximately 60 surveys were distributed and 22 completed surveys were received. *Id.* at 12 & app. 2, VLA of MA comments at 1.

241. *Id.* at 12 & app. 2, VLA of MA comments at 2.

VARA.²⁴² On the issue of waiver, most artists surveyed said they would not waive their moral rights.²⁴³ The factors that would affect an artist's decision to waive moral rights include money, opportunity, and whether or not the work was commissioned, public, or a temporary piece.²⁴⁴

The Volunteer Lawyers for the Arts (VLA) opposes the waiver provision of VARA and believes that it should be abolished.²⁴⁵ VLA assert that VARA is undermined by the fact that artists may be compelled, possibly unknowingly, to surrender their moral rights.²⁴⁶ Moreover, they suggest that the waiver provision violates "the spirit of the Berne Convention"²⁴⁷ According to the VLA's comments, the potential damage resulting from the waiver provision cannot be quantified at this early date.²⁴⁸ An informal survey of New York City practicing lawyers, conducted by the VLA, suggests that experience is limited with respect to waiver of moral rights in artists' contracts.²⁴⁹ The VLA suggests that this is due to a lack of knowledge by museums and galleries.²⁵⁰ Moreover, they urge that it is simply a matter of time before waiver provisions find their way into artists' contracts.²⁵¹ The VLA further submits that due to artists' lack of bargaining clout they will be unable to avoid waiver provisions and in addition would obtain nothing in return for their waiver.²⁵² Congress should, the VLA suggests, provide safeguards due to artists' lack of bargaining power by repealing VARA's waiver provision.²⁵³ Additionally, they urge that the public policy of encouraging creativity supports the repeal of the waiver provision.²⁵⁴

John Henry Merryman, Sweitzer Professor of Law, Emeritus, Stanford University, responded to the Copyright Office's inquiries regarding waiver of moral rights provided by VARA.²⁵⁵ Professor Merryman stated that moral rights protection serves either the artist's interest alone,

242. *Id.*

243. *Id.*

244. *Id.* Some artists who responded that they would never be willing to waive their moral rights nevertheless provided factors which should influence their decision with respect to waiver of moral rights.

245. REGISTER OF COPYRIGHTS, *supra* note 212, at 12-13 & app. 2, VLA comments at 1. VLA is a non-profit New York organization "which provides free arts-related legal assistance and education to artists and arts organizations in all creative fields otherwise unable to afford such services." *Id.* at app. 2, VLA comments at 1.

246. *Id.* at app. 2, VLA comments at 1.

247. *Id.* (quoting STEPHEN M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS 514 (2d ed. 1989)).

248. *Id.* at app. 2, VLA comments at 2.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at app. 2, VLA comments at 2-3.

254. *Id.*

255. REGISTER OF COPYRIGHTS, *supra* note 212, at 9 & app. 2, Merryman comments. Professor Merryman has written extensively on art and the law, including the issue of artist's moral rights. *See, e.g.*, John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339 (1989); JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS, AND THE VISUAL ARTS 142-47 (2d ed. 1987); John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976).

or a mixture of the artist's and the public's interest.²⁵⁶ He observed that VARA appears to secure moral rights only for the artist.²⁵⁷ If the intent of Congress was to protect only the artist's interest then Professor Merryman finds the waiver provision of VARA reasonable.²⁵⁸ On the issue of protecting artists from exploitation as a result of unequal bargaining power, Professor Merryman states that based on his "experience these concerns are vastly exaggerated by sentimentalists whose fervor is inversely proportional to their familiarity with the art world."²⁵⁹ Professor Merryman does suggest, however, that if the public's interest is protected, as in the California Cultural and Artistic Creations Preservation Act,²⁶⁰ the artist's wavier ability should be limited to the artist's interest.²⁶¹

On the use of waivers in contracts, Professor Merryman states that most artist usually do not have written agreements when they sell or consign their works.²⁶² Those who do use written contracts generally have dealers who are able to adequately protect the artist's interest.²⁶³ Furthermore, artists seem to have an aversion to written contracts.²⁶⁴ These observations of Professor Merryman are based on "impressionistic evidence."²⁶⁵

Although the waiver provision has not been given extensive attention, some commentators have addressed the subject. One commentator suggests that if courts do not void waivers, in at least some situations, the rights provided by VARA would be meaningless.²⁶⁶ The possibility that a waiver may be voided, however, could negatively affect a protected work's market price.²⁶⁷ The commentator ultimately reaches the conclusion that VARA is a futile and inexact law which will benefit only lawyers.²⁶⁸

Another commentator suggests that VARA does not fully meet article 6bis of the Berne Convention.²⁶⁹ Article 6bis does not explicitly state that moral rights are unwaivable and inalienable, however, it has been

256. REGISTER OF COPYRIGHTS, *supra* note 212, at 9 & app. 2, Merryman comments at 1.

257. *Id.*

258. *Id.*

259. *Id.*

260. CAL. CIV. CODE § 989 (West Supp. 1991).

261. REGISTER OF COPYRIGHTS, *supra* note 212, at app. 2, Merryman comments at 1.

262. *Id.* at 9 and app. 2, Merryman comments at 1-2.

263. *Id.* at 9 & app. 2, Merryman comments at 2.

264. *Id.*

265. *Id.* at 9 & app. 2, Merryman comments at 1.

266. Fein, *supra* note 192, at G1.

267. *Id.*

268. *Id.* The commentator's conclusion is based on concerns over the waiver provision and interpretation problems which will probably arise in litigation of the statute. *Id.* See *supra* notes 191-99 and accompanying text.

269. Damich, *supra* note 15, at 947. Professor Damich has also written on the subject of the United States adherence to the Berne Convention with respect to article 6bis. Furthermore, he testified at the subcommittee's hearings regarding United States adherence to the Berne Convention. See Edward J. Damich, *Moral Rights in the United States and Article 6bis of the Berne Convention: A Comment on the Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLA J.L. & ARTS 655

suggested that this meaning is implied from the language.²⁷⁰ Moreover, the official interpretation comments provided by the World Intellectual Property Organization (WIPO) support the concept that article 6*bis* protects artists even from themselves.²⁷¹

The fact that most artists are without substantial bargaining power is not seriously debated by anyone. How to deal with this problem in light of the United States strong tradition of freedom of contract, however, is debated. One commentator suggests that the inequity in bargaining power places artists in a category that has traditionally allowed limitations on freedom of contract.²⁷² Since VARA covers such a narrow group of works, the commentator urges that inalienable and unwaivable rights under VARA are easier to justify because the difficult cases, which would arise with other artistic works, do not arise under VARA.²⁷³ Moreover, the practical considerations addressed by the VARA provisions dealing with destruction and buildings provide additional justification for inalienable and unwaivable VARA rights.²⁷⁴ The commentator further suggests that, in light of the deficiencies of VARA, its preemption provision should be interpreted narrowly in order to continue the broader protection provided by state moral rights statutes.²⁷⁵ After all, these laws were cited in the BCIA as part of the reason why the United States already complied with article 6*bis* of the Berne Convention.²⁷⁶

As is obvious from the above discussion, the waiver provision is believed by some to be appropriate and by others to destroy the substance of the law. The study by the Copyright Office does not yet provide any real insight into who is correct. The study continues, however, until December of 1995. Hopefully, the results will provide Congress with the kind of information needed to make an intelligent decision on VARA's waiver provision. We should be hesitant in drawing conclusions on the ultimate effects of the waiver provision, particularly in light of the limited information presently available and the conflicting opinions on the subject. The gut instinct of most would probably be that the waiver provision will be unfair to the "starving artist." If most artists do not use written agreements, however, the waiver provision is not an issue. Even if the waiver provision is unfair to artists, how unfair does it have to be before Congress will be willing to limit the freedom of an artist and a buyer to contract?

(1986); HOUSE COMMITTEE ON THE JUDICIARY, BERNE CONVENTION IMPLEMENTATION ACT OF 1988, H.R. REP. NO. 609, 100th Cong., 2d Sess. (1988).

270. Damich, *supra* note 15, at 967.

271. *Id.* at 947, 967.

272. *Id.* at 967 (citing RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) on unconscionability). Professor Damich stated that this is the reason why the power of termination was made inalienable in the Copyright Act. *Id.* at 967 & n.110.

273. *Id.* at 968. Examples of difficult cases include adaptation and editing. *Id.*

274. *Id.*

275. *Id.* at 947-48.

276. *Id.* See *supra* note 9.

The ultimate solution to the waiver provision debate may lie somewhere between an unfettered waiver provision and a paternalistic prohibition of waivers. Congress commonly provides extra protection for a weaker party without completely removing the right to contract.²⁷⁷ For example, consumer protection laws allow contracting while protecting the consumer from unfair sellers.²⁷⁸ The same concept could be applied to protect the artist under VARA. For example, the buyer of an artist's work could be required to provide additional consideration for a waiver above and beyond the price of the work. Because courts are generally reluctant to question the adequacy of consideration unless it is egregiously unfair, Congress could define a minimum reasonable consideration for a waiver to allow consistency in determining what is fair.²⁷⁹ This reasonable consideration could be based on, for example, a percentage of the selling price of the work. Arguably, a buyer could manipulate the price under this scheme to make the amount paid for the waiver and the work together no more than the buyer would have actually paid for the work. This waiver consideration scheme, however, would still provide more protection for the artist, particularly because evidence as to the work's value could be reviewed. Moreover, if the artist's asking price is substantially less than the selling price, a court's suspicion should be raised and the transaction should be carefully reviewed. Because VARA rights are not assignable or transferable,²⁸⁰ a subsequent owner of a work would have to negotiate with the artist to get a new waiver. Presumably, the artist would have been paid for the first waiver, therefore, consideration for subsequent waivers should not be necessary for the subsequent waiver to be valid.

A final suggestion for modification of VARA's waiver provision involves the contract policing doctrine of unconscionability.²⁸¹ While unconscionability is somewhat undefined²⁸² it "has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."²⁸³ Courts are generally unwilling to apply the doctrine of unconscionability unless the situation is egregious.²⁸⁴ Therefore, while unconscionability would provide a means of protecting the artist under VARA, it is unlikely that the courts will apply this doctrine except in the most extreme cases. Moreover, uniformity of results, a primary purpose of VARA,²⁸⁵ would very likely be sacrificed as each court defined unconscionability. The doctrine of unconscionability could,

277. E. ALLAN FARNSWORTH, *CONTRACTS* § 4.29 (2d ed. 1990).

278. *Id.*

279. *Id.* § 2.11.

280. 17 U.S.C. § 106A(e) (Supp. V 1993).

281. *Id.* § 4.28.

282. FARNSWORTH, *supra* note 277, § 4.28, at 327.

283. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

284. FARNSWORTH, *supra* note 277, § 4.28, at 335.

285. H.R. REP. No. 514, 101st Cong., 2d Sess. 21 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6931.

however, be applied uniformly if Congress defined the requirements for a waiver provision to be unconscionable. This option would leave the waiver provision very much like it is but would provide courts with guidance on policing these provisions.

While the above suggestions may not be free from potential problems, they do suggest that there is a middle ground somewhere between the two extreme positions regarding the waiver provision. The legislative process requires that Congress balance interests and devise a solution that is a reasonable compromise between those interests. There is no reason to believe that Congress cannot or should not provide a waiver provision that is fair to all parties involved.

IV. CONCLUSION

VARA is a relatively new law with many unresolved issues. Courts have barely begun the statutory interpretation process. Moreover, the future of VARA's waiver provision is unclear. The present waiver provision, if heavily used, could eviscerate any meaningful protection under VARA. The art community could, however, largely ignore the waiver provision, resulting in minimal impact on VARA rights. Additionally, there is debate whether this is the beginning of broader moral rights protection in the United States or merely an isolated niche. As the issues are resolved, VARA will either become a powerful protection for a small group of artists or a useless addition to copyright law.

