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Visualizing the Path Foward: The Visual Artist Rights Act of 1990 and Recommendations for a Response by American Museums

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VISUALIZING THE PATH FORWARD
THE VISUAL ARTISTS RIGHTS ACT OF 1990 AND
RECOMMENDATIONS FOR A RESPONSE BY AMERICAN MUSEUMS

by Heather Hope Stephens

A thesis submitted in partial fulfillment of the
requirements for the degree of

Master of Arts
in
Museum Professions

Seton Hall University, South Orange, NJ

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Advisor: Dr. Petra ten-Doesschate Chu, Ph.D.



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ABSTRACT

**Visualizing the Path Forward:
The Visual Artists Rights Act of 1990 and
Recommendations for a Response by American Museums**

AUTHOR: Heather Hope Stephens

ADVISOR: Dr. Petra ten-Doesschate Chu, Ph.D.

In 1990, Congress passed the Visual Artists Rights Act, U.S. Code Title 17 §106A (commonly known as VARA). This Act served the purpose to grant the moral rights of attribution and integrity to artworks which fell under the Act's definition of a 'work of visual art.' Prior to VARA's adoption, American artists had no recourse if the owner of their artwork decided to make any changes to the work, or damaged or destroyed the work through willful neglect or other means. While some state-level legislation existed to protect these rights, in New York, Massachusetts, and California, for example, these laws provided different protections from state-to-state and were only effective in that one state. In most of the country, artists had no moral rights.

In the years since VARA's passage, the Act has been tested in the courts, and a basic case history now exists. However, many questions regarding the interpretation of the Act remain unresolved. Additionally, museums have failed to address the Act in their operations and negotiations with artists, leaving the museums vulnerable to potential legal action from artists. While few cases have specifically involved museums, the results of several non-museum cases have a direct impact on museums and contain the basis for clear guidelines as to how museums should be conducting themselves in relation to living artists. Failure to do so leaves museums in a position which cannot be defended on legal or ethical grounds.

This thesis examines the European precedent for moral rights in the United States and provides a case history of pre- and post-VARA legal cases in the United States to show how far Americans have come in recognizing moral rights. Concerns and potential issues raised by VARA for museums are examined and recommendations are made for how the American museum community should go forward in addressing the Act. This thesis argues that museums have an ethical duty to address the moral rights of artists and to find ways to uphold these rights while also furthering their own mission to protect, preserve, and interpret the objects in their collections.

To my Mom, who always supports me in whatever I do.

Thank you for your trust, your love, and always being there for me.

Your support continually gets me through every challenge set before me.

Also, to my Dad. You may be gone, but I know you are still here guiding and protecting me.

I love you always.

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LIST OF ABBREVIATIONS

- AAM: American Association of Museums
AAMD: Association of Art Museum Directors
AARA: Artists Authorship Rights Act (New York State)
ABC: American Broadcasting Companies
ACDA: Allegheny County Department of Aviation
AIC: American Institute of Conservation
BBC: British Broadcasting Corporation
BCIA: Berne Convention Implementation Act
CAA: College Art Association
CAPA: California Arts Preservation Act
ESP: Empire State Plaza (Albany, NY)
FCC: French Copyright Code
FIPC: French Intellectual Property Code
FQC: Friends of Queen Catherine (Queens, NY)
GSA: [United States] General Services Administration
ICOM: International Council of Museums
JX3: John Carter, John Swing, and John Veronis, aka “Three Js”
MAPA: Massachusetts Art Preservation Act
Mass MoCA: Massachusetts Museum of Contemporary Art (North Adams, MA)
NAFTA: North American Free Trade Agreement
NEA: National Endowment for the Arts
OGS: [New York State] Office of General Services
PAFAPA: Pennsylvania Fine Arts Preservation Act
RC-AAM: Registrars’ Committee of the American Association of Museums
TRIPS: Trade-Related Aspects of International Property Rights
VARA: Visual Artists Rights Act of 1990
WCT: World Intellectual Property Organization Copyright Treaty
WIPO: World Intellectual Property Organization
WPPT: World Intellectual Property Organization Performance and Phonograms Treaty

PREQUEL AND INTRODUCTION: RICHARD SERRA'S *TITLED ARC*

In the not-so-distant past, owners of artworks had full control over them once they gained full and complete title. They could choose to alter works in any way they wished, and the artist would have no recourse. Perhaps the most famous example of what could happen to an artwork after the transfer of title is Richard Serra's *Tilted Arc*, a site-specific work that was removed from its location and thus, according to the artist, destroyed, on 15 March 1989. Serra made every attempt to prevent the work's removal and 'destruction,' but the legal landscape in America at the time provided Serra with no rights concerning his artworks once they were sold.

In 1961, a zoning ordinance was passed in New York City, the purpose of which was to encourage the development of open spaces in the city. The newly created spaces generally took the form of open, empty areas in front of buildings. They often became the location of drug trafficking and served as refuges for the city's homeless population. Later zoning ordinances would encourage public use of open spaces by moving these areas to easily-patrolled locations, such as commercial interiors.¹

The area known as Federal Plaza was completed in 1968.² Located in lower Manhattan, it was an open space framed by two government office buildings.³ The buildings housed local and federal courts, the Department of Health, and the Division of Motor Vehicles, and faced New York City's civic center, Foley Square. The Federal Building was the largest federal office building in the country outside of Washington, D.C.⁴

¹ Harriet F. Senie, *The Tilted Arc Controversy: Dangerous Precedent?* (Minneapolis and London: University of Minnesota Press, 2002), xvi.

² *Ibid.*, 22.

³ *Ibid.*, xi.

⁴ Tom Finkelpearl, "Interview with Douglas Crim on *Tilted Arc* (January 1997)" 60-79, in Tom Finkelpearl, *Dialogues in Public Art* (Cambridge, Mass: MIT Press, 2000), 61.

In 1973, Alfred Easton Poor, architect of Federal Plaza, suggested that a sculpture be installed in the plaza. The suggestion was quite specific, stating that the sculpture should be abstract, made of steel or bronze (either of which would match the buildings), between thirty and thirty-five feet high and eight to ten feet wide, and have a granite base.⁵ Commissions such as the one proposed by Poor fell under a program called 'percent for art,' designed to allocate funds towards public art.⁶ Under the United States General Services Administration (GSA)'s Art-in-Architecture Program as established by Congress, one-half of one-percent of the cost of new federal construction was used to pay for the acquisition of art in order to enhance that structure. The art was meant to enrich the lives of workers in and visitors to the building.⁷ The selection panels for these commissions were appointed by the National Endowment for the Arts (NEA), and many of the public art commissions administered by the GSA involved monumental, freestanding sculptures.⁸ In 1977, GSA altered their policy regarding commissions, requiring that all recommendations include the opinions of art experts, preferably experts drawn from the local community, in order to represent that community's interests. This policy was further altered the following year to require that the art expert be a specialist in contemporary art. On 20 July 1979, the GSA selection panel met at Federal Plaza, and some of the members were not initially convinced that the plaza was in need of sculpture. In the end, the panel recommended to the GSA, in order of preference, Robert Irwin, Richard Serra, Donald Judd, Robert Rauschenberg, Ronald Balden, and Ellsworth Kelly. Of these, only Irwin was favored by the architect's representative. However, Irwin had recently accepted a commission from the GSA for the renovation of the Old Post Office building on Pennsylvania Avenue in Washington, D.C.

⁵ Senie (2002), 22.

⁶ *Ibid.*, xi.

⁷ Vilis R. Inde, *Art in the Courtroom* (West Port, CT: Prager, 1998), 52.

⁸ Senie (2002), 3.

Therefore, he was eliminated from consideration for the Federal Plaza commission. By default, Serra became the panel's first choice. On 16 August 1979, the GSA design review panel followed the selection panel's recommendation and proposed that Serra receive the Federal Plaza commission. Later that month, on 31 August, GSA Administrator Freeman approved Serra for the commission.⁹

On 3 March 1980, Serra presented the design for *Tilted Arc* to the GSA design review panel. Voting members of the panel included representatives from the GSA and the Public Buildings Services¹⁰ Handwritten notes from the meeting relate how the design review panel reacted to Serra's proposal. One stated, "John Q. Public will call it a wall," while another declared that people would see its "symbolism as a barrier."¹¹ At this time, the GSA's preference for large-scale, abstract sculpture was well established, as was the agency's tendency to commission works that were unfamiliar to, and aesthetically disconnected from, the public, and thus frequently misunderstood.¹² Despite the misgivings of some of its members, the committee commissioned Serra to execute the work he had proposed.

The public reaction to *Tilted Arc* was probably foreseeable. Serra's 1971 work, *Sight Point*, was commissioned for Wesleyan University (Middletown, CT), where it was intended for, but never installed at, the university's Center of the Arts.¹³ The campus architect for Wesleyan objected to the sculpture, because it would have risen taller than the surrounding buildings.¹⁴ Originally installed in 1980 in New York City, Serra's *T.W.U.* also did not find success in its

⁹ Ibid., 22-23.

¹⁰ Ibid., 23.

¹¹ Handwritten notes from the 2 March 1980 design review panel meeting in the GSA project file, reprinted in Senie (2002), 23.

¹² Senie (2002), 6.

¹³ Ibid., 10.

¹⁴ Klaus Ottmann, "Interview with Richard Serra," *Journal of Contemporary Art*, 1989, <http://www.jca-online.com/serra.html>.

intended location, and the sculpture was permanently relocated to Germany. A work similar in composition to *Tilted Arc* was displayed by Serra in New York's Leo Castelli Gallery in 1981.¹⁵ This piece was a precursor to *Tilted Arc*, both in design and critical reaction. Both works were likened by critics to a "curved Berlin Wall."¹⁶ In view of these negative reactions, the design review panel should have been aware of the type of reaction that was common in New York and elsewhere to Serra's sculptures.

Serra's *Tilted Arc* was installed in Federal Plaza in 1981. The artist received \$175,000 for the commission.¹⁷ When completed, the sculpture was ten feet high, one hundred and twenty feet long, and constructed of Cor-Ten self-rusting steel.¹⁸ (Serra called the oxidation of the surface a "golden amber patina.")¹⁹ There had been little public preparation for *Tilted Arc*. Shortly after installation, a chief judge at the U.S. Court of International Trade began to complain to the head of the GSA about the work.²⁰ The judge, Edward Re, started a letter-writing campaign with the intention to have the work removed.²¹ Additionally, the Army Corps of Engineers employees started a petition, also seeking its removal. In the press, the *New York Times* and *Village Voice* art critics stated the work was the very worst of the city's public sculptures and the epitome of what was wrong with contemporary public art.²²

Three years later, in 1984, William Diamond was appointed as the new GSA regional administrator for the New York office. By this time, the protests against *Tilted Arc* had ended.²³ No one was circulating petitions against the sculpture in the Federal Plaza offices, and Judge Re

¹⁵ Senie (2002), 14 and 18.

¹⁶ Kim Levin, "Richard Serra's Arch Angle," *Village Voice*, 25-31 March 1981, 94, reprinted in Senie (2002), 18.

¹⁷ Finkelpearl, 61.

¹⁸ Senie (2002), xi.

¹⁹ *Inde*, 51.

²⁰ Senie (2002), xi and xiv.

²¹ Finkelpearl, 61.

²² Senie (2002), xi.

²³ *Ibid.*

had ceased his letter-writing campaign. However, Diamond found a comrade in Judge Re, and with his support, Diamond restarted the process to have the work removed from the Plaza.²⁴ In March of 1985, Diamond convened a three-day public hearing on the work, bringing an international audience to an issue which was, at heart, of local concern.²⁵ The hearing, it has been contended, was poorly announced to New York's art community.²⁶ Approximately two-thirds of those who spoke at the hearing were in favor of keeping *Tilted Arc* in Federal Plaza. A petition in support of *Tilted Arc*, with 3,763 names, was presented to Diamond, and another with 3,791 names supported its relocation.²⁷ Many of the signatures seeking relocation came from employees within the Federal Building.²⁸

Following the public hearing, on 1 May 1985, Diamond officially recommended that *Tilted Arc* be removed from Federal Plaza.²⁹ In 1987, a panel of art professionals tried, and failed, to find a suitable site for *Tilted Arc*.³⁰ Of all possible locations, only the Storm King Art Center (Mountainville, NY) expressed an interest in accepting the work, and this offer was withdrawn when the center became aware that Serra considered the piece to be site-specific, and its relocation would equal its destruction in the artist's eyes.³¹ Serra had exhausted all legal remedies available to him as he attempted to save his work. Finally, in 1989, Diamond succeeded in his attempts, and *Tilted Arc* was removed from Federal Plaza to a warehouse in Brooklyn.³² On the night of its removal, 15 March 1989, police had to hold back the protestors

²⁴ Finkelpearl, 61.

²⁵ Senie (2002), xii.

²⁶ Finkelpearl, 61.

²⁷ Inde, 58 and 67.

²⁸ Finkelpearl, 61.

²⁹ *Ibid.*, 64,

³⁰ Senie (2002), xii.

³¹ Inde, 56.

³² Senie (2002), xii.

who wanted *Tilted Arc* to remain in Federal Plaza.³³ The work was later relocated to a GSA storage facility in Middle River, MD.³⁴ Serra maintained that the work was site-specific and that the very act of its removal from Federal Plaza resulted in the work's destruction.³⁵

Serra brought a suit against the GSA over the removal of the work in the case *Serra v. U.S. General Services Admin.* Serra's argument before the district court was that *Tilted Arc*'s removal from Federal Plaza resulted in its total destruction, as it was designed specifically for the site. This argument relied heavily on the concept of moral rights, which were not protected by U.S. law at that time. On appeal, Serra's lawyers convinced the artist to abandon his moral rights argument. However, the Second Circuit court affirmed the dismissal by the district court.³⁶

Serra's *Tilted Arc* could be removed and 'destroyed' because moral rights were not recognized in the United States until 1990. It was not until the passage of the Visual Artists Rights Act (U.S.C. § 106A) (VARA) that artists had any legislative protection to allow them to prevent the willful destruction of an artwork they had created. While *Tilted Arc* is probably the most famous 'destruction' of an artwork against the artist's wishes, it is by no means the only example. Due to the American system of property rights, owners could do whatever they wanted to an artwork once they had gained legal title, regardless of what the artist's wishes were. An owner could repaint a sculpture in a different color, immobilize or motorize a mobile, or paint over and obliterate a mural. Owners had total control over the artwork and artists had no say in how those works were treated. It was only the influence of European legal standards, resulting in VARA's passage in 1990, that would change this situation in America.

³³ Inde, 50.

³⁴ Senie (2002), 2.

³⁵ Finkelpearl, 63.

³⁶ Kristin Robbins, "Note: Artists Beware: The Effect of the First Circuit's Refusal to Apply VARA to Site-Specific Art," *Tulane Journal of Technology and Intellectual Property* v. 9 (Spring 2007), 395-400, 400.

This thesis will examine how the Visual Artists Rights Act of 1990 came to exist in the American legal landscape and assess what effects it may have on American museums. The discussion will begin, in Chapter 1, with an overview of the European basis of moral rights, as well as the mistaken belief of the American legislature, in the years before 1990, that the United States legal system provided moral rights protection under the Lanham Act. Chapter 2 will present an overview of cases brought forth prior to VARA's adoption, cases which provide an understanding of how moral rights were treated prior to the Act. Following this, Chapter 3 will provide a discussion of a selection of cases that have been brought under VARA since 1990. Chapter 4 will discuss the implications of these cases and of VARA in general on American museums. In the Conclusion, this thesis will make a series of recommendations for how American museums should address the Act. It is the argument of this thesis that American museums have been negligent in failing to address VARA in their dealings with living artists. Museums need to not only bring themselves into legal alignment with the Act, but also take a high ethical stance by making upholding artists' moral rights an important component of their mission statements. Thus far, the American museum community's response has been to seek waivers of artists' rights, an approach which disregards the importance of moral rights to the artistic community and the alignment of these rights with museums' mission to conserve, preserve, document, and interpret the cultural output of our nation.

CHAPTER 1: MORAL RIGHTS FROM EUROPEAN TO AMERICAN STATE LAW

Moral rights, the heart of VARA, are a product of French case law and German legal theory (with some additional influence coming from Italian law). Known as *Urheberpersönlichkeitsrecht* in German, moral rights are often referred to by their French translation, *droit moral*.³⁷ The term ‘moral rights,’ is not to be confused with the everyday usage of the word ‘moral.’ In this treatment, ‘moral’ refers to the rights of the author, artist, or other creator to protect their personal value in a work and its influence on their reputation.³⁸ In other words, the ‘morality’ is concerned with the artist’s intrinsic connection to their artwork, a connection which continues to exist after its completion or sale. This right is separate from any economic rights in the work.

Moral rights originated in France.³⁹ Their purpose was to protect an artist’s extension of his or herself, as represented by their created artworks.⁴⁰ The historical development of moral rights into a legal concept spans centuries. Until the end of the Middle Ages, artists had few legal rights, and the protections that did exist were against plagiarism.⁴¹ Greater defenses emerged after the invention of the printing press.⁴² Early safeguards were conferred upon printers by the ruling sovereign. These rights, in effect, granted a monopoly on the reproduction

³⁷ Cyrill P. Rigamonti, “Deconstructing Moral Rights,” *Harvard International Law Journal* v. 47 (Summer 2006), 353-412, 356 and fn. 15.

³⁸ Betsy Rosenblatt, “Moral Rights Basics,” Harvard Law School, last modified March 1998, <http://cyber.law.harvard.edu/property/library/moralprimer.html>, accessed 27 November 2007.

³⁹ Rebecca Stuart, “Comment: A Work of Heart: A Proposal for a Revision of the Visual Artists Rights Act of 1990 to Bring the United States Closer to International Standards,” *Santa Clara Law Review* v. 47 (2007), 645-684, 674.

⁴⁰ Rikki Sapolic, “When Less Isn’t More: Illustrating the Appeal of a Moral Rights Model of Copyright Through a Study of Minimalist Art,” *IDEA: The Intellectual Property Law Review* v. 47 (2007), 453-495, 476.

⁴¹ Karen M. Corr, “Protection of Art Work through Artists’ Rights: An Analysis of State Law and Proposal for Change,” *American University Law Review* v. 38 (April 1989), 855-879, 862.

⁴² Sapolic, 477.

of printed materials for a fixed period. At this early stage, rights did not yet include a right of sale.⁴³

It was not until the time of the French Revolution that rights would evolve into a form of proto-moral rights. In the years following the Revolution, these new rights developed as a legal response to the ideologies of the Revolution and the Enlightenment.⁴⁴ It was at this time that French jurists first accepted that an artist's interests in their created works extended beyond commercial concerns.⁴⁵ Additionally, it began to be recognized that artists' rights did not necessarily depend on recognition by the crown, an important aspect of moral rights in Europe to this day. In 1793, the French jurists enacted *droit patrimoniaux*, which were mostly economic rights. These rights introduced the concept that artists enjoyed natural rights not conferred by the crown or other form of governance.⁴⁶ Instead, the courts recognized that there were natural rights intrinsic to artistic works that arose from the very act of creation and were not conveyed upon the artist by the sovereign ruler.⁴⁷ It is through the act of artistic creation that artists acquire these rights.⁴⁸ The concept that moral rights descend upon the artist via the act of creation conceptually separates artistic creation from all other forms of labor. The difference resides in the perceived especially intimate connection or bond between the artistic creator's personality and the creative product.⁴⁹

Artists had to wait until the nineteenth century for the French courts to begin to define their non-commercial rights, those that would become known as moral rights. Conceived as

⁴³ Corr, 863.

⁴⁴ Sapolic, 477.

⁴⁵ Patricia Failing, "Artists Moral Rights in the United States before VARA/1990: An Introduction," *The Committee on Intellectual Property of the College Art Association: Beyond Copyright: Do Artists Have Rights? A Panel Discussion of the Visual Artists Rights Act (VARA)* (February 2002), 2.

⁴⁶ Corr, 863.

⁴⁷ Sapolic, 477.

⁴⁸ Corr, fn. 1.

⁴⁹ Failing, 2.

natural rights of artists and other creators, they conceptually are analogous to American's rights to life, liberty, and the pursuit of happiness.⁵⁰ Another reasonable comparison would be to civil rights or rights of publicity. They are personal, unassignable, and perpetual. Moral rights deferred from the earlier *droits patrimoniaux*, in that moral rights do not have the economic concerns of the earlier rights.⁵¹ According to the theory of moral rights, the artwork is an extension of the artist's personality or soul, therefore an attack or misrepresentation upon an artwork is also an attack or slander against the artist.⁵² These concepts, first formed in the nineteenth century, would be more fully developed by the time that *droit moral* was codified in France in 1957.⁵³

In most of the European Union today, moral rights apply to all forms of artistic creation, not solely to the visual arts.⁵⁴ However, they only exist for creators, not for corporations or individuals who hire others to create their works.⁵⁵ This issue can be complex, and what qualifies as a work-for-hire often needs to be interpreted by the courts if the relationship is not exactly defined in the commissioning documents. Cases such as *Carter v. Helmsley-Spear, Inc.* (discussed below) would attempt to define this topic as it relates to moral rights as protected by VARA in the United States. As discussed in the *Carter* case, when it is not explicitly stated if a commissioned work is a work-for-hire, the American courts would examine the relationship between the artists and the commissioning institution. The court would thereby determine if the artists were contracted workers or employees, which helps to define if the final product is a work-for-hire or not, thereby determining if the work is eligible for VARA protection.

⁵⁰ Ibid.

⁵¹ Sapolic, 476-478.

⁵² Failing, 2.

⁵³ Corr, 863.

⁵⁴ Failing, 2.

⁵⁵ Rigamonti, 359.

Additionally, within countries that adopt the orthodox theory of moral rights (such as in much of the European Union), the authors of works which are eligible for copyright maintain their inalienable moral rights in the works in addition to and separately from any economic rights.⁵⁶ With the exception of the special circumstance involving works permanently attached to buildings, moral rights cannot be waived by creators. This is because moral rights in Europe are perpetual and inalienable.⁵⁷ This perpetual and inalienable nature means that their protections continue even after the creator transfers legal title of the work to another through sale.⁵⁸ This comes from the fact that most European countries hold to the so-called ‘natural rights rhetoric’ of copyright.⁵⁹

This approach to copyright has three main components. First, it is held that an author or creator has the economic right to profit from his or her creations. Second, an author or creator has the right to obtain any rewards which result from his or her contributions to society. Finally, an author or creator has the right to protect the integrity of his or her creations, as these are extensions of the artist’s personality. This third component of the natural rights rhetoric of copyright is the foundation of moral rights.⁶⁰

Moral rights, as they exist in much of the European Union, can be broken down into a number of specific rights. First among these is the right of integrity, also known as the *droit au respect de l’oeuvre*.⁶¹ This right protects the physical integrity of the artwork even after title is passed through sale or other means.⁶² Post-transfer, the creator retains the right to preserve the

⁵⁶ Rigamonti, 355.

⁵⁷ Failing, 2 and 4.

⁵⁸ Sapolic, 477.

⁵⁹ Stuart, 672.

⁶⁰ Ibid.

⁶¹ Sapolic, 477.

⁶² Failing, 2.

work from any form of alteration or mutilation that may result, whether it is intentional or due to negligence on the part of the owner.⁶³ The French moral rights statute does not make any distinction between intentional or negligent alterations.⁶⁴

In France, the right of integrity is further subdivided into a number of components. These are the right against modification, the right against destruction, the right to complete, and the right against unfaithful reproduction. These rights do have some limitations, despite their inalienability. For example, French courts recognize some restrictive contract terms, such as those concerning adaptation to a different medium.⁶⁵

The second moral right is the right of attribution, or the *droit à la paternité*.⁶⁶ This is the creator's right to have his or her name associated with the work and not with any works that he or she did not create.⁶⁷ This right prevents the artistic work from being wrongly attributed to another.⁶⁸ It also gives the creator the right to remain anonymous or to use a pseudonym. However, the right of attribution does not protect the creator if a third party discloses his or her true name.⁶⁹

Two other aspects of moral rights, which are closely related, are the rights of disclosure and withdrawal.⁷⁰ This first, the right of disclosure, is also called *droit de divulgation*.⁷¹ France, Spain, and Switzerland are best known for protecting this right for artists.⁷² Specifically, the right of disclosure grants the artist the ability to decide when the work is complete and can be

⁶³ Sapolic, 672.

⁶⁴ Corr, 865.

⁶⁵ Edward Damich, "The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors," *Georgia Law Review* v. 23 (Fall 1988), 1-95, 38.

⁶⁶ Sapolic, 477.

⁶⁷ Failing, 2.

⁶⁸ Sapolic, 477.

⁶⁹ Rigamonti, 364.

⁷⁰ *Ibid.*, 362.

⁷¹ Sapolic, 477.

⁷² Stuart, 676

displayed publicly.⁷³ This discretion for releasing the artwork to the public applies to both the financial and the commercial spheres.⁷⁴ Right of disclosure would, for instance, allow an artist to demand in her last will and testament for all her unfinished or undisclosed works to be destroyed upon her death, a right that an American court would currently be able to prevent as an economically wasteful action. This right grants the artist full control over what works are linked to her *oeuvre* and impacts her reputation as an artist, even if that decision offers no economic benefit, thereby underlining moral rights' focus on aspects of artistic creation other than economic benefits. In other words, the creator, when protected by the right of disclosure, has complete and ultimate authority over when any of his or her work is published, sold, or unveiled to the public.⁷⁵ In France, because moral rights exist into perpetuity, the right of disclosure allows an artist to prevent the disclosure of works even after the economic rights and the material object have been transferred.⁷⁶

The related right, the right of withdrawal or retraction, is also referred to as *droit de retrait ou de repentir*.⁷⁷ This right is closely correlated with the right of disclosure.⁷⁸ The right of withdrawal allows the creator to withdraw or remove their name from a work if it has been in some way damaged or falsely presented.⁷⁹ The creator also has the right to withdraw a work from public view or modify it, even after being first presented publicly. In the context of property rights as they exist in the United States, this right goes against the common American notion of economic and property rights, as it permits an artist to change or destroy an artwork

⁷³ Failing, 2.

⁷⁴ Stuart, 676.

⁷⁵ Sapolic, 477-489.

⁷⁶ Damich, 36.

⁷⁷ Sapolic, 477.

⁷⁸ Stuart, 676.

⁷⁹ Failing, 2.

even after selling it.⁸⁰ Compared with the other aspects of moral rights, the right of withdrawal is less developed on the international stage. It is only recognized in France, Germany, Italy, Spain, and Belgium.⁸¹ In France, it was first recognized in the 1957 law codifying moral rights.⁸² There have been few court decisions concerning the right of withdrawal.⁸³ In France, there were no pre-1957 cases addressing the issue, and there was only one case in the period between 1957 and 1988.⁸⁴ Some have even gone so far as to suggest that the right is more symbolic than practical.⁸⁵ The right of withdrawal is highly controversial. Since an artist can simply state new convictions or beliefs if an old work no longer represent who they are as an artist, the right is seen as unnecessary.⁸⁶ In countries where the right of withdrawal is protected, authors may only enforce that right if they previously have indemnified the other party in an advance contract.⁸⁷

In the last two decades, moral rights have been adopted through the passage of legislature by the United States, the United Kingdom, Australia, Ireland, and New Zealand. It is not surprising that these countries have been such late adopters, despite the long evolutionary history of moral rights in continental Europe. It has long been recognized that a major distinguishing feature between Continental Europe's civil law and the Anglo-American system of common law (found in most former British colonies) is their approach towards moral rights. Few international treaties, especially those dating from after World War II, address moral rights, making late adoption possible in these common law countries. For example, the 1994 Agreement on Trade-

⁸⁰ Sapolic, 477-488.

⁸¹ Stuart, 676.

⁸² Damich, 40.

⁸³ Rigamonti, 363 and fn. 62.

⁸⁴ Damich, 40.

⁸⁵ Rigamonti, 363.

⁸⁶ Stuart, 676.

⁸⁷ Rigamonti, 363.

Related Aspects of International Property Rights (TRIPS) excludes moral rights, as does the 1994 North American Free Trade Agreement (NAFTA).⁸⁸

The 1886 Berne Convention for the Protection of Literary and Artistic Works, commonly referred to as the Berne Convention, was drafted in order to expand nationally-recognized copyright protections beyond their home country. Specifically, the section designated as Article 6bis provides protection of moral rights of an author or creator of any form of artistic or literary work.⁸⁹ This provision has been a part of the Berne Convention since 1928.⁹⁰ The exact text of the Article reads

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

“(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

“(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed [emphasis added].”⁹¹

The first paragraph of the Article is the section which codifies moral rights.⁹² Article 6bis extends protections of artists' moral rights until after the death of the creator, equal to the length of copyright protection, as it exists in the granting country. The Article also serves as the means

⁸⁸ Rigamonti, 353-357.

⁸⁹ Stuart, 646-648.

⁹⁰ Rigamonti, 356.

⁹¹ As reprinted in the Legal Information Institute at Cornell Law School website, “Berne Convention, As Revised,” <http://www.law.cornell.edu/treaties/berne/6bis.html>, accessed 23 January 2008.

⁹² Rigamonti, 356.

of protection for the rights of attribution and integrity. However, the Article does not protect the rights of disclosure or withdrawal.⁹³

The Berne Convention's date of adoption and its means of implementation have varied across nations. France and Germany both extend the Article 6*bis* protection of the right of integrity by preventing any modification, even if not detrimental to the author's honor or reputation. With the exclusion of computer programs in France and motion pictures in Germany, any form of substantive modifications to works is prohibited.⁹⁴

The United States did not become a signatory of the Berne Convention until 1989.⁹⁵ This came one year after President Reagan signed the Berne Convention Implementation Act (BCIA). Becoming a signatory nation to the Convention brought America into closer compliance with international standards of artistic protection than had previously existed. The United States signed the Convention to increase American copyright holders' international protections and to resolve some ongoing international copyright issues, including problems such as overseas piracy.⁹⁶

As discussed above, moral rights were rarely mentioned in international treaties in the post-World War II period. It was not until 1996 that Article 6*bis* was included via reference into the World Intellectual Property Organization's (WIPO) Copyright Treaty (WCT). In that same year, moral rights were expanded to protect performing artists through the WIPO Performances and Phonograms Treaty (WPPT) via Article 5(1). On an international level, Article 5 of the

⁹³ Stuart, 649.

⁹⁴ Rigamonti, 364-365.

⁹⁵ Matt Williams, "Comment: Balancing Free Speech Interests: The Traditional Contours of Copyright Protection and the Visual Artists' Rights Act," *UCLA Entertainment Law Review* v. 19 (Fall 2005), 105-131, 121-22.

⁹⁶ Stuart, 646-648.

WPPT and Article *6bis* of the Berne Convention are the only relevant provisions concerning moral rights.⁹⁷

In European legal theory, there are two views concerning copyright protection, dualism and monism. Monism is the theory that copyright alone provides protection of intellectual, moral, and economic rights. This approach is best exemplified in the German system. The theory only allows the succession of moral rights by testamentary disposition, not by absolute right. The entire copyright passes on to successors, including any moral or economic rights, since they are all considered to be one right. The successors can then exercise any moral rights to protect the works in any way they see fit, even if these rights are exercised in the successors' own interests instead of the interests of the original creator.⁹⁸

The German code does permit the right of withdrawal, but only in instances where the artist is unable to reconcile the content of the withdrawn work with their personal convictions. In order for a court to find that an author's right of integrity has been infringed, the court must find that the work has been modified, the modification represents a tangible threat to the creator's interests, and that the creator's interests are not in some way outweighed by any other conflicting considerations. The current law dates to 9 September 1965, though there have been numerous amendments since that original passage, with the last amendment passed on 10 September 2004.⁹⁹

In comparison, dualism, as exemplified in the French Copyright Code (FCC), presents two elements of copyright protection. These are the rights to the intellectual and moral nature of the work and the right to any economic gains from the work. Under the dualism theory, the

⁹⁷ Rigamonti, 358.

⁹⁸ Stuart, 674-675.

⁹⁹ Rigamonti, 363, fns. 34 and 84.

creator's moral rights are separate from the economic rights. The artist's moral rights are perpetual, inalienable, and imprescriptible. The economic rights, on the other hand, are limited in time, alienable, and subject to prescription. In countries that follow the dualism theory, legal successors of the creator are required to enforce the moral rights of the creator. If the successors fail to enforce the author's moral rights, there is the possibility of judicial intervention to ensure that these duties are fulfilled. Additionally, in contrast to the monism theory, under dualism, successors have to exercise the moral rights in order to protect the works and the author, not to further their own personal interests.¹⁰⁰ The French law's focus is on the protection of artists' rights, but in practice, the law has the added benefit of protecting artworks.¹⁰¹ In 1994, the FCC became a part of the French Intellectual Property Code (FIPC), which combined moral rights provisions previously found throughout the French Act on Literary and Artistic Property of 1957.¹⁰²

In the United States, copyright protection first appears in the Constitution, but the document fails to make any mention of moral rights.¹⁰³ The granting of copyright depends on the existence of originality, meaning that it was created by the author and not copied from other previous works. Additionally, there must exist some creativity in the work. The protections extended by copyright law are for original expressions, not for original ideas. Additionally, the U.S. Copyright Act allows for an artist or creator to bring an infringement action against another

¹⁰⁰ Stuart, 674-675.

¹⁰¹ Corr, 862.

¹⁰² Rigamonti, fn. 33.

¹⁰³ Failing, 2.

whether or not their application for copyright was accepted or denied.¹⁰⁴ The right of attribution is not discussed in the Act.¹⁰⁵

Concerning fine art, it is not by protecting potential market value that an incentive to create will be generated as a means to motivate artists. It is by protecting the artist's persona and her personal reputation. There have been few cases in the United States involving fine art and copyright.¹⁰⁶ However, American society grants more importance on economic growth than aesthetic values.¹⁰⁷ This is recognized in the difficulty to pass moral rights legislation in America. Moral rights recognize and encourage recognition of artistic worth, not economic gain.¹⁰⁸ American copyright law makes an assumption that a major incentive for creation is market demand, an assumption which ignores that fine art is often influenced by culture and the desire to create, regardless or whether there is a market demand for the final product.¹⁰⁹ Under the Copyright Act of 1976, creators are protected in their rights of public distribution, public performance, and public display, protection from derivative works, right of objection to free performances, termination of transfers and licenses, and involuntary transfers, among other rights.¹¹⁰ Moral rights are not recognized or addressed.

In the 1960s, art professionals in the United States began to call for a comprehensive statutory protection of artists' moral rights.¹¹¹ However, it was not until 1979 that moral rights received their first protection in America with the passage of the California Arts Preservation Act

¹⁰⁴ Sapolic, 455-463.

¹⁰⁵ Damich, 37.

¹⁰⁶ Sapolic, 455 and 485.

¹⁰⁷ Athena Tacha, "The Vagaries of VARA: Can the Law Save Your Art?" *The Committee on Intellectual Property of the College Art Association: Beyond Copyright Do Artists Have Rights? A Panel Discussion of the Visual Artists Rights Act (VARA) Session Paper* (February 2002), www.studiolo.org/CIP/VARA/Tacha/Tacha.htm, accessed 17 September 2007., 5.

¹⁰⁸ Robbins, 397.

¹⁰⁹ Sapolic, 455.

¹¹⁰ Damich, 41.

¹¹¹ Corr, 868.

(CAPA).¹¹² This Act allows artists to obtain injunction relief, damages, and attorney's fees if an intentional alteration or mutilation of the artist's work occurs.¹¹³ The two objectives of CAPA were to protect the creative vision of artists by prohibiting defacement and to protect the public interest in maintaining the physical integrity of significant works of art.¹¹⁴ CAPA is the only state law to recognize this public interest. The right of paternity is established in Section 987(d) of the Act, while the right of integrity is protected in Section 987(c)(1). In the statute, the right of integrity prohibits acts but not omissions. Failure to provide adequate care is not an action that can be addressed by the artist. For instance, if a work is damaged due to environmental factors which the owner did not prevent, the artist is not protected. CAPA also establishes separate standards of care for collectors and conservators. While the collectors' standard is that of intentional physical defacement, the conservators' standard is set at the level of gross negligence.¹¹⁵ In 1983, the Act was amended to allow non-profit arts organizations to act on behalf of deceased artists to enforce their rights under CAPA.¹¹⁶ This was an important and necessary amendment, as CAPA allows protection for the lifetime of the artist plus fifty years.¹¹⁷ In comparison with European models, CAPA protects one bundle of moral rights, specifically the right of integrity, and this right continues after the sale of the work.¹¹⁸ CAPA also provides artists with a resale right, which survives the artist's death and passes to the heirs.¹¹⁹ All rights granted under CAPA may be transferred if it is executed in writing.¹²⁰

¹¹² Failing, 2.

¹¹³ Corr, 857.

¹¹⁴ Failing, 3.

¹¹⁵ Corr, 867 and 870-875.

¹¹⁶ Failing, 3.

¹¹⁷ Corr 873.

¹¹⁸ Failing, 3.

¹¹⁹ David Spatt, "Moral Rights Survive the Sale and the Southern District," (1997), www.artslaw.org/MORAL.html, accessed 17 September 2007, 3.

¹²⁰ Corr, 872-83.

CAPA was followed five years later, in 1984, with the Artists Authorship Rights Act (AARA), which passed in the state of New York. Unlike CAPA, AARA emphasizes the right to disavow a work that fails to represent the artist's intentions. The Act prevents the display of an artwork or its reproductions by a living artist if it is to be displayed in an altered state which could be harmful to the artist's reputation.¹²¹ AARA creates protections for both the rights of paternity and integrity. Additionally, AARA imposes a stricter standard of care than CAPA. Unlike the California Act, AARA does not distinguish between owners and conservators. However, liability only becomes an issue if the work is publicly displayed. If a work is damaged, the Act permits the owner to withhold the work from public display and thereby escape any liability. Instead of creating a duty to protect the work from damage, the Act instead creates a duty to not display a damaged work publicly. Under the Act, artists may grant consent to the display of an altered work, and they may also withdraw previously granted consent. The Act does not stipulate whether artists may waive their rights, and their duration is not specified. It is generally believed by legal theorists that the protections afforded in the Act expire upon the death of the creator, but this has not yet been tested in court.¹²²

The 1980s would see the passage of other state-level moral rights protections, all falling in line with one of the two original legislations, AARA or CAPA. The CAPA precedent would be followed by legislation in Massachusetts, Pennsylvania, and New Mexico.¹²³ AARA would provide the basis for the legislation passed in Maine, Rhode Island, New Jersey, Nevada, Louisiana, and Connecticut.¹²⁴ These nine state statutes were all passed by 1988, two years

¹²¹ Failing, 3.

¹²² Corr, 869 and 871-874..

¹²³ Failing, 3.

¹²⁴ Ibid. and Corr, 869.

before the passage of VARA.¹²⁵ The various state statutes, with the exception of CAPA, fail to recognize that the public does have an interest in preserving works of art.¹²⁶ California, Connecticut, Massachusetts, Pennsylvania, and New Mexico each allow protection to last for the lifetime of the creator plus fifty years.¹²⁷ Other states' legislation sets the limit to protection to the lifetime of the artist. Either approach fails to realize that the public's interest in preserving works of art in fact increases with the age of the work, making any termination of moral rights protection premature.¹²⁸

State-level legislation concerning moral rights began to be passed, because it had become clear to some that moral rights were not protected under U.S. copyright law or any other form of legislation, despite some theorists arguing otherwise. U.S. copyright law developed with a focus on advancing industry, creating a series of protections that are geared towards property rights, not moral. This fact was recognized in the case of *Eldred v. Ashcroft*, where the Supreme Court stated that American copyright protections deviated from their European counterparts in that the American system was not aimed at protecting moral rights. Due to the fact that moral rights are in conflict with traditional common law property rights, the American copyright system has historically resisted extending moral rights protection or even recognizing the existence of artists' moral rights.¹²⁹

At the time of signing the Berne Convention in 1989, Congress believed that the United States was already in compliance with the Convention through the Lanham Act and its supposed protection of moral rights. This Act is a trademark statute, not intended for application to the

¹²⁵ Damich, 3.

¹²⁶ Corr, 876-877.

¹²⁷ Failing, 3.

¹²⁸ Corr, 877.

¹²⁹ Sapolic, 456 and 476.

moral rights arena. Specifically, Section 43(a) was cited by American lawmakers as an example of how the existing American system provided moral rights protection.¹³⁰ This section of the Act states

“§ 43 (15 U.S.C. §1125). False designations of origin; false description or representation “(a) (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any *word, term, name, symbol, or device*, or any *combination thereof*, or any *false designation of origin*, false or misleading description of fact, or false or misleading representation of fact, which--

“(A) is likely to cause confusion, or to cause mistake, or to deceive as to the *affiliation, connection, or association of such person with another person*, or as to the *origin, sponsorship, or approval of his or her goods, services, or commercial activities* by another person, or

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

“(2) As used in this subsection, the term ‘any person’ includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this Act in the same manner and to the same extent as any nongovernmental entity.

“(3) In a civil action for trade dress infringement under this Act for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional [emphasis added].”¹³¹

This Section of the Act was intended to codify the common law trademark doctrine commonly referred to as ‘passing off,’ meaning the intentional misrepresentation of one person’s goods or works as being the work of another. The Act was meant to provide protection to consumers and producers.¹³²

¹³⁰ Stuart, 650-651.

¹³¹ As reprinted in the University of Connecticut School of Law website, “Lanham Act (1946) § 43,” <http://www.law.uconn.edu/homes/swilf/ip/statutes/lanham43.htm>, accessed 23 January 2008.

¹³² Stuart, 650.

One reason Congress believed that the Act provided moral rights protection was due to *Gilliam v. American Broadcasting Cos.*¹³³ In this case, the Monty Python comedians sued to prevent ABC from airing an edited version of their sketch comedy show as it was originally created for the British Broadcasting Corporation (BBC). The comedians sued ABC under Section 43(a) of the Lanham Act.¹³⁴ It was contended by the comedians that the program had been overly edited by ABC, affecting the content and having a negative impact on the comedians' integrity.¹³⁵ The Second Circuit found the Lanham Act to be appropriate for application in this case, since it would prevent ABC from presenting to the public a distorted version of the original work. This court went on to state that this protection was a means of recognizing the artist's moral right in his or her own work, even if moral rights fell outside of the scope of the Copyright Act.¹³⁶ It was this outcome which would lead Congress to believe that the Lanham Act provided adequate protection of artists' moral rights.¹³⁷

Thus, the court displayed an acceptance of the possibility that moral rights could be protected under U.S. law, despite the fact that they were not recognized at that time.¹³⁸ However, a large factor in the plaintiffs' success in *Gilliam* was the fact that they still owned copyright in the episodes, and that the editing done on the part of ABC for content and time on U.S. television was not found to be derivative. In its decision, the court found that the editing, because it was unauthorized, was an infringement of the copyright similar to any other unauthorized use that exceeded the granted license. The case would become known as the

¹³³ *Ibid.*, 651.

¹³⁴ Robbins, 399.

¹³⁵ Stuart, 399.

¹³⁶ Robbins, 399.

¹³⁷ Stuart, 651.

¹³⁸ Corr, 856.

leading moral rights case in the period prior to the passage of VARA.¹³⁹ However, the precedent set by the *Gilliam* case was not followed in later cases.¹⁴⁰

In the Final Report of the Ad Hoc Working Group on United States Adherence to the Berne Convention, it was concluded that substantial protections of moral rights existed in the United States.¹⁴¹ However, in the case of *Dastar Corporation v. Twentieth Century Fox Film Corporation*, the Supreme Court rejected the claim that the Lanham Act provided any protection of the right of attribution. This decision called into question if the United States was at all in compliance with the Berne Convention.¹⁴² In fact, it became clear that the BCIA did not establish any federal protection of moral rights.¹⁴³

¹³⁹ Stuart, 653-654.

¹⁴⁰ Damich, 3.

¹⁴¹ Ibid.

¹⁴² Stuart, 651-52.

¹⁴³ Damich, 3.

CHAPTER 2: PRE-VARA PUBLIC ART AND COMMISSIONS

In the years prior to the passage of VARA, artists had to turn to other forms of legal protection when their moral rights were threatened. Before the Act's passage, moral rights protection was not codified into United States statutes or recognized by case law. Artists alleged defamation, unfair competition, breach of contract, and violations of the Lanham Act in attempts to protect these rights. As already discussed, the Lanham Act was a trademark statute which was intended to protect consumers and producers.¹⁴⁴

Besides the *Gilliam* case already discussed, other cases addressing moral rights were brought forth prior to VARA's passage. One early example is *Vargas v. Esquire*, which reached the Seventh Circuit in 1947.¹⁴⁵ Antonio Vargas produced numerous pictures of pin-up girls for *Esquire* magazine from 1940-46. These pictures became so popular that they were known as 'Vargas Girls.' In 1946, Vargas terminated his contractual relationship with the magazine. After the end of the professional relationship, *Esquire* magazine continued to publish the pictures they had on hand, without attributing the works to Vargas.¹⁴⁶ Vargas claimed that the magazine's use of the pictures without his permission or proper attribution was a violation of his moral rights.¹⁴⁷ Vargas contended that while he had transferred both his economic rights and copyrights in the images to *Esquire*, he had retained his moral rights, including the right to attribution.¹⁴⁸ In the end, the court found in favor of *Esquire* magazine.¹⁴⁹ Vargas was attempting to claim his *droit à la paternité*, or right of attribution, described above. By publishing the so-called 'Vargas Girls' in the magazine without attributing the images to Vargas, *Esquire* was failing to properly

¹⁴⁴ Stuart, 650-653.

¹⁴⁵ *Ibid.*, 653.

¹⁴⁶ Damich, 2.

¹⁴⁷ Stuart, 653.

¹⁴⁸ Damich, 2.

¹⁴⁹ Stuart, 563.

attribute the works to the artist. However, Vargas was ultimately unsuccessful, because moral rights were not yet protected in the United States.¹⁵⁰

A few years later, in 1949, another pre-VARA case involving moral rights came through the American court system.¹⁵¹ The case, *Crimi v. Rutgers Presbyterian Church in City of New York*, involved a visual artist by the name of Alfred Crimi.¹⁵² Crimi executed a mural for the Rutgers Presbyterian Church in 1938.¹⁵³ The mural depicted Jesus Christ, and the church's parishioners objected to the mural, feeling that it showed too much of Jesus' bare chest.¹⁵⁴ Responding to the parishioners' complaints, Rutgers Presbyterian Church painted over the fresco in 1946.¹⁵⁵ Crimi was not provided with an opportunity to remove the mural from the church.¹⁵⁶ Additionally, the artist was not notified by the church prior of the fresco's destruction.¹⁵⁷ Crimi sued the church, charging that the work's destruction was both a violation of customs generally upheld between artists and art collectors and that the church's destruction infringed upon the artist's interests in the work. The artist defined his interests as proprietary and relating to his professional and artistic honor. He also stated that the destruction had an impact on his reputation, and that, as an artist, he had a right to prevent the mutilation or destruction of any of his artworks.¹⁵⁸ In other words, Crimi's argument was that he retained a moral right to protect the integrity of his works, even after sale.¹⁵⁹ Crimi specifically sued Rutgers Presbyterian

¹⁵⁰ Damich, 2.

¹⁵¹ Stuart, 653.

¹⁵² Spatt, 1.

¹⁵³ Damich, 1.

¹⁵⁴ Spatt, 1.

¹⁵⁵ Corr, 1.

¹⁵⁶ Damich, 1.

¹⁵⁷ Spatt, 1.

¹⁵⁸ Robbins, 399.

¹⁵⁹ Damich, 2.

Church for the right to restoration of the fresco, its removal from the church, or for damages in the amount of \$150,000.¹⁶⁰

The New York court found that Crimi had no recourse against the church for its actions. It was the opinion of the court that once the artist sold the artwork, the work became the property of the church without condition.¹⁶¹ Interestingly, the New York County Supreme Court found that the destruction of the work had no effect on Crimi's reputation as an artist, but the court did concede that a distortion of the work would have impacted his reputation. However, even if the court were to accept that Crimi's moral rights had been violated in some way, there was still no avenue of recourse against Rutgers Presbyterian, since there was no moral rights protection in the United States.¹⁶² The court simply could find no precedent for what Crimi was charging.¹⁶³ Therefore, Crimi lost his case and could not be awarded compensatory damages.¹⁶⁴

In the *Crimi* case, as in the *Gilliam* case, the court recognized that an artist did have some moral rights.¹⁶⁵ However, each of these cases also reflects the common law stance that is based on the premise of complete property ownership.¹⁶⁶ The tension between the desire to recognize moral rights and the American stance that upholds property ownership to be complete and without influence of outside interests would continue even after the passage of VARA.

Crimi and *Gilliam* should not be misconstrued as examples that moral rights recognition was a widely-held and accepted stance of American courts, even if they could not be enforced.

¹⁶⁰ Stephen E. Weil, "The 'Moral Right' Comes to America," December 1979, *Beauty and the Beasts: On Museums, Art, the Law, and the Market*, comp. Stephen E. Weil (Washington, DC: Smithsonian Institution Press, 1983), 226.

¹⁶¹ Stuart, 653.

¹⁶² Robbins, 399.

¹⁶³ Weil (1983), 260.

¹⁶⁴ Spatt, 1.

¹⁶⁵ Natalia Thurston, "A Note and Brief: Buyer Beware: the Unexpected Consequences of the Visual Artists Rights Act," *Berkeley Technology Law Journal* v. 20 (2005), 701-721, 704.

¹⁶⁶ Robbins, 400.

On the contrary, in most cases brought prior to the passage of VARA, artists failed to have moral rights recognized as valid, as the following egregious examples indicate.

When a black and white mobile by Alexander Calder was donated by a private collector to the Pittsburgh Airport in 1958, the Allegheny County Department of Aviation (ACDA) had the work painted green and gold,¹⁶⁷ the official colors of Allegheny County.¹⁶⁸ Additionally, the way in which the mobile was installed immobilized it, so the ACDA had the work motorized. The overall effect was that the work was presented completely contrary to Calder's intentions. Calder was not able to seek compensation from the ACDA, because moral rights were not protected in the United States by federal statute, or in the state of Pennsylvania, at that time.¹⁶⁹ It was only after Calder's death, when the situation received national publicity in the January 1978 issue of *ARTnews*, that Allegheny County finally returned the work to its intended condition, something the County had repeatedly refused to do at Calder's request during his lifetime.¹⁷⁰ Today, Calder's *Pittsburgh* mobile would have likely been protected in the courts, thanks to the protections afforded by VARA.¹⁷¹

For a more detailed example of how many cases played out in the American courts, Athena Tacha's work *Marianthe* is worth consideration. In 1985, Tacha won a competition to create a work for the University of South Florida campus in Fort Myers. In the mid-1990s, the University of South Florida sold its campus to Thomas Edison College. At the end of the decade, in 1999, Thomas Edison College notified Tacha that there were damages to *Marianthe* caused by weathering which had made the sculpture dangerous, and the college would be tearing down the work. It is unclear if the commissioning institution did not adhere to Tacha's

¹⁶⁷ Spatt, 1.

¹⁶⁸ Weil (1983), 226.

¹⁶⁹ Spatt, 1.

¹⁷⁰ Weil (1983), 226.

¹⁷¹ Spatt, 1.

directions concerning the sculpture’s maintenance, or if those directions were not related to the new owners upon sale of the land and sculpture. Either way, cracks that had developed in the mortar were not properly repaired, allowing rainwater to seep into the sculpture and rust the reinforcing steel rods, which in turn resulted in the brick walls to pop apart.¹⁷² The lack of maintenance of the sculpture was in violation of the contract between the University of South Florida and the artist, which stated, in part, “The University shall keep the Sculpture in good condition and repair it and permanently display it... The University shall not destroy or alter the Sculpture.”¹⁷³ Unfortunately, *Marianthe* pre-dated the passage of VARA. Despite the contract, the sculpture was destroyed in 2000 and now is known only through photographs.¹⁷⁴

As these cases demonstrate, the moral rights of attribution and integrity were afforded little to no protection prior to the adoption of VARA. Owners, in having complete property rights to artworks with no limitations, were free to do whatever they liked regarding the works of art. And while a perceived ‘gentleman’s agreement,’ upheld by tradition and courtesy, held that most owners would not purposefully and substantially alter the appearance of a work, or falsely attribute a work to another (or to no one), the fact is that there was not legal system to block such actions. Once artists transferred legal title in a work, they lost all control over how that work would appear, be displayed, or to whom it would be attributed. While alterations to an artwork’s integrity or incorrect attribution could be considered ethically questionable, it was still fully legal.

¹⁷² Tacha, 2.

¹⁷³ Contract between the University of South Florida and Athena Tacha, reprinted in Tacha, 2*f*.

¹⁷⁴ Tacha, 3.

CHAPTER 3: VARA SINCE 1990

In 1981, artist Athena Tacha was the winner in a national invitational, sponsored by the Philadelphia Redevelopment Authority, for a city-block park in the Franklin Town development in downtown Philadelphia, to be named *Connections*. In September 1991, Tacha signed a contract with the Franklin Town Corporation, and the following June, the Corporation raised a \$300,000 maintenance fund and donated the park to the City of Philadelphia.¹⁷⁵ The contract signed between the artist and the Corporation stipulated that "...the Artist waives in favor of the Owner any rights she may have under the Pennsylvania Fine Arts Preservation Act (72 [sic] P.S., §§ 2201 et seq)."¹⁷⁶ This initial contract maintained Tacha's copyright interests in the design of *Connections*. That same June 1992, the City of Philadelphia requested that Tacha sign an additional waiver.¹⁷⁷ This one, in part, stated that Philadelphia's "Fairmount Park Commission will use its best efforts to preserve and maintain the integrity of the design of the Franklin Town Park..." but that "Athena Tacha... does hereby waive and relinquish all rights she has... under the [PA] Fine Arts Preservation Act, with the *exception* of §2103."¹⁷⁸ Neither contract signed by the artist makes any mention to VARA.¹⁷⁹

The Pennsylvania Fine Arts Preservation Act (PAFAPA) was passed in 1986 and serves as protection of 'works of fine art' and of artists' rights.¹⁸⁰ This state Act differs from VARA in some significant aspects. First, the rights awarded under PAFAPA last for the lifetime of the artist plus fifty years.¹⁸¹ VARA only provides protection for the lifetime of the artist.¹⁸² Second,

¹⁷⁵ *Ibid.*, 4.

¹⁷⁶ Contract between Franklin Town Corporation and Athena Tacha, reprinted in Tacha, 4.

¹⁷⁷ Tacha, 4.

¹⁷⁸ Contract between City of Philadelphia and Athena Tacha, reprinted in Tacha, 4.

¹⁷⁹ Tacha, 5.

¹⁸⁰ Pennsylvania Fine Arts Preservation Act (PAFAPA), The General Assembly of Pennsylvania, "House Bill No. 490," Session of 1985, Printer's No. 3927, 1.

¹⁸¹ *Corr*, 873.

the Pennsylvania Act permits the transfer of all rights if it is executed in writing.¹⁸³ VARA does not permit an artist's rights to be transferred, only waived.¹⁸⁴ VARA and PAFAPA are similar, however, in that both allow the artist to mutilate or destroy the artwork, regardless of transfer of economic rights.¹⁸⁵ Section 2103 of PAFAPA, which the City of Philadelphia contract allowed Tacha to maintain, states that the artist will "...retain at all times the right to claim authorship..."¹⁸⁶ This would make it appear that Tacha has waived her right of integrity but maintained her right to attribution. However, both contracts only reference PAFAPA, which is overruled by VARA, since VARA is a federal statute. Should a problem arise concerning *Connections*, Tacha should theoretically still retain her rights under VARA, even if she waived them under PAFAPA. If a problem with *Connections* were to occur and the case were brought to trial, it would add to case law history, especially regarding VARA retroactivity and the definition of a 'work of visual art.'

While *Connections* has, thankfully, not been a cause for litigation, other cases based on VARA have reached the courts since its passage. Considering its relative youth, it is not surprising that the case law of VARA is not very extensive. However, there have been a number of cases that have begun to throw some light on the way the Act will be interpreted by the courts in the future, since American courts generally look back to past decisions when trying new cases. This chapter will provide a review of some of the cases that have been brought under VARA since its implementation in 1990.

¹⁸² Visual Artists Rights Act (VARA) 17 U.S. Code Title 17, Section 106A, "Rights of Certain Authors to Attribution and Integrity," (§ 106A), (d)(1).

¹⁸³ Corr, 873.

¹⁸⁴ VARA 17 U.S.C. § 106A (e)(1).

¹⁸⁵ Tacha, 4.

¹⁸⁶ PAFAPA § 2103.

The cases are presented thematically, while recognizing that each case covers many aspects of law, both under the Act and in regards to other issues, such as employment law. The first case presented, *Carter v. Helmsley-Spear, Inc.*, deals with a number of issues, including what it means to distort, mutilate, or modify a work, what a ‘work of visual art’ as defined by VARA is, and how the designation of a work-for-hire affects VARA protections. The following two cases, *Pavia* and *Martin*, will highlight problems presented in Section (d)(2) of the Act, which provides limited retroactive protection. The courts’ interpretation of two phrases that appear in the Act but are not clearly defined by its text, ‘work of recognized stature’ and ‘work of visual art’ will be examined in the *Pollara* and *Phillips* cases in an attempt to attain a working idea of how the courts read these terms and apply them to real cases. Next, the VARA term ‘distortion, mutilation, or other modification of the work’ will be revisited in relation to problems of conservation and repair in the *Flack* case. The *Scott* case will then readdress the issue of defining a ‘work of recognized stature,’ providing the most recent interpretation by the courts. This case review will conclude with the *Peker* case, which addresses if and how VARA provides protections against unapproved reproductions of artworks. Ultimately, this case review should provide an understanding of where the courts now stand on some of the most important problems raised by VARA and what rights are recognized by the courts in relation to artists’ moral rights.

The first case tried under VARA was *Carter v. Helmsley-Spear, Inc.* In December 1991, the art group know as ‘JX3’ or ‘Three Js’ entered into a contract that would lead to this case. JX3 was comprised of three artists, John Carter, John Swing, and John Veronis, the three ‘J’ initials of their shared ‘John’ name lending themselves to the group’s title. JX3 entered into a contract with SIG Management Company to design and install a multimedia installation in the

lobby of a commercial building located in Queens, New York.¹⁸⁷ The contract called for JX3 to design, create, and install sculptures and other permanent installations in the building's lobby and other areas.¹⁸⁸ In early 1994, the leasing company, 474431 Associates, filed for bankruptcy, and the tenant's lease was terminated. Helmsley-Spear, Inc. became the building's new managing agent. Upon taking possession of the building, this company barred the plaintiffs from entering the property, because the company did not approve of the sculptures that had been installed in the lobby.¹⁸⁹

JX3 sued Helmsley-Spear, citing their VARA protection and stating that the company's actions would alter or destroy their artwork. The three artists wanted to force the company to allow them to finish the project.¹⁹⁰ When the case went to court, the Southern District of New York court applied the 'Aymes factors' to determine if the plaintiffs were employees or independent contractors at the time of designing and installing the sculptures. This test is named for the case in which these factors were first articulated, *Aymes v. Bonelli*, 980 F. 2d 857, 860 (2d Cir. 1992). The factors examined are: did the hired party have the right to control the manner and means of production; did the hired party have the requisite skill to carry out the task; was the hired party afforded employee benefits; what was the tax treatment of the hired party; and was the hired party assigned additional projects. The treatment of the plaintiffs by the property manager in this case was mixed. The court found that the artistic freedom of JX3, the great skill required performing the commission, and the fact that the commissioning party had the right to assign other projects all suggested that the plaintiffs were independent contractors according to

¹⁸⁷ *Inde*, 86.

¹⁸⁸ *Spatt*, 2.

¹⁸⁹ *Stuart*, 661.

¹⁹⁰ *Spatt*, 2.

the Aymes factors. However, the tax treatment of the artists (they were given health benefits and W-2 forms) suggested that they were in fact employees.¹⁹¹

The Southern District of New York court, in applying the Aymes factors, decided that the artists were independent contractors, meaning that the sculptures were not a work-for-hire.¹⁹² This court also found that the destruction or removal of the works would damage the honor and reputation of the plaintiffs.¹⁹³ Additionally, the court found that the work was one of recognized stature. Based on these findings, the court issued an injunction to prevent the work's distortion, mutilation, modification, or destruction, and also blocked the work's removal, which would destroy portions of the work.¹⁹⁴ JX3 was unsuccessful in convincing the court that Helmsley-Spear's refusal to allow the artists to finish the artwork was equal to a distortion, mutilation, or modification of the work under VARA.¹⁹⁵

The court also stated that VARA places a burden on the property owner who permitted the installation of visual art work onto the property. This burden on the property owner would not expire until the death of the artists.¹⁹⁶ While Helmsley-Spear was not the original property owner to permit the work's installation, the sale of the work by SIG Management Company did not constitute a waiver of the moral rights. Helmsley-Spear, as the new owner, would have to comply with VARA for the duration of those rights within the work.¹⁹⁷ The only way to circumvent this would be if the artists were to agree to the work's alteration or removal.¹⁹⁸ The Second District's second opinion provided the first judicial interpretation of VARA for the legal

¹⁹¹ Stuart, 662 and fn. 142.

¹⁹² *Ibid.*, 662.

¹⁹³ Williams, 125.

¹⁹⁴ Stuart, 664.

¹⁹⁵ Spatt, 3.

¹⁹⁶ *Ibid.*, 2.

¹⁹⁷ VARA 17 U.S.C. § 106A (e)(2).

¹⁹⁸ *Inde*, 86.

community since its passage into law.¹⁹⁹ However, the court's opinion is somewhat clouded by the decision of the court that the work would also have been protected by the New York Act, AARA.²⁰⁰

The plaintiffs' victory was short lived. The plaintiffs and the defendant both appealed the District Court's decision. Helmsley-Spear argued that JX3 were in fact employees and, therefore, not eligible for protection under VARA. JX3, on the other hand, was seeking permission to complete the work.²⁰¹ The Court of Appeals for the Second Circuit reversed the District Court's decision.²⁰² The Appellate Court found the sculpture to be a work-for-hire.²⁰³ This was based on various aspects of the way in which the artists were treated by the commissioning party as they were installing the artwork. Their employment agreement required the artists to perform functions other than creating art as required, they were paid on a weekly basis, they received employee benefits, and after they were terminated, two of the three members of JX3 received unemployment benefits, listing the property manager as their former employer.²⁰⁴ All of these factors combined suggested that the members of JX3 were actually employees, and therefore their created output would be works-for-hire. This decision meant that VARA would offer no protection for the works or the plaintiffs, and would allow Helmsley-Spear to remove or destroy the sculpture as they pleased.

While *Carter v. Helmsley-Spear, Inc.* provided the first judicial interpretation of VARA, the aspect on which the case turned was not an issue specific to the visual arts. *Carter* touched on many important issues concerning VARA, including the Act's constitutionality, its purpose,

¹⁹⁹ Spatt, 2.

²⁰⁰ *Inde*, 86-87.

²⁰¹ *Ibid.*, 87.

²⁰² *Williams*, 125.

²⁰³ *Stuart*, 664.

²⁰⁴ *Inde*, 87.

moral rights in America, the definitions of a ‘work of visual art’ and a ‘work of recognized stature,’ and the prejudice to the honor or reputation of an artist. However, the major issue in *Carter* was whether JX3 produced works-for-hire. The plethoras of VARA-specific issues raised by the case were unimportant in light of this problem, limiting *Carter*’s importance.

Many of the problems inherent in VARA would have to wait to be tried in later cases. One major question concerned the retroactivity of the Act. According to Section (d)(1), artists’ rights in works that were created on or after VARA’s effective date expired at the artist’s death. However, for works created before VARA’s effective date, for which the title had not passed as of the effective date, Section (d)(2) provides protection to last the length of the copyright protection, generally the lifetime of the author plus seventy years for works created after 1 January 1978. Two cases, *Pavia v. 1120 Ave. of the Americas Associates* and *Martin v. City of Indianapolis*, would test this provision and its application to real-world situations.

In the Philip Pavia case, the artist’s sculpture was moved, without his consent, to a commercial warehouse accessible to the public. In 1963, almost three decades before the adoption of VARA, Pavia received a commission from New York Hilton Joint Venture (a partnership between the Hilton Hotels Corporation and the Prudential Insurance Company of America) to create an artwork for the lobby of the Hilton Hotel located at Sixth Avenue, New York City. At the time of the commission, the New York Hilton Joint Venture assured the artist that the work would be on permanent display in the hotel lobby. Pavia created the work, titled *The Ides of March*, which was comprised of three large, diamond-shaped forms grouped with a smaller form lying on one side. The sculpture remained on display in the hotel lobby until 1988,

and title never passed from Pavia. The artist would file for copyright registration of the work on 11 January 1995.²⁰⁵

On 11 July 1988, the New York Hilton Joint Venture entered into an agreement with the Hippodrome Garage and Building Company, Edison Parking Corporation, 1120 Avenue of the Americas Associates, and Harold A. Gottesman (a general partner of 1120 Avenue of the Americas Associates). This agreement allowed *The Ides of March* to pass out of the possession of the New York Hilton Joint Venture and be displayed at the Hippodrome Parking Garage. This garage was a commercial warehouse located at 1120 Avenue of the Americas, New York City. The building's lobby and ground floor were accessible to the public twenty-four hours a day, seven days a week. Two of the four pieces comprising *The Ides of March* were displayed in the garage, while the other two pieces were not, resulting in the work being exhibited in a partially disassembled state. Pavia alleged that the improper display damaged his honor and reputation as an artist, and from 1992 to 1994, the artist repeatedly requested that the work be displayed properly and intact. Additionally, the New York Hilton Joint Venture requested that the work be returned to their possession.²⁰⁶

The District Court of the Southern District of New York found that Pavia's rights under New York's AARA were not preempted by VARA, even though the alleged improper display of the work occurred before VARA's adoption. The court found that VARA could provide protection to the sculpture despite its creation before the passage of the Act, citing 17 U.S.C.A. § 106A(d)(2).²⁰⁷ This section reads

“With respect to works of visual art created before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, but title to which has not, as of such

²⁰⁵ *Pavia v. 1120 Ave. of the Americas Associates*, 901 F.Supp. 620, 623-624.

²⁰⁶ *Ibid.*, 624.

²⁰⁷ *Ibid.*, 626-627.

effective date, been transferred from the author, the rights conferred by subsection (a) shall be coextensive with, and shall expire at the same time as, the rights conferred by section 106.”²⁰⁸

Pavia had never transferred title to the work, and therefore the court held that it was protected under VARA.²⁰⁹ Had Pavia transferred title prior to VARA’s enactment, this would not have been the case.

The *Martin* case, while testing the retroactivity of VARA, also tried how work-for-hire artworks relate to the Act. In 1984, Jan Martin was contracted to erect a twenty by forty feet metal sculpture on land owned by John LaFollette, who was the chairman of the company that hired Martin. LaFollette’s company, Tarpenning-LaFollette Co., supplied the materials that would be used for creating the sculpture, titled *Symphony #1*. One clause in the contract between Tarpenning-LaFollette and Martin stated that if the land was at some point to be sold, or if it was decided that the sculpture was no longer fit for the land, both LaFollette and Martin would receive ninety days written notice to remove the sculpture.²¹⁰

In April 1993, LaFollette was notified that the City of Indianapolis was holding hearings to discuss the possible acquisition of the land. At this point, Kim Martin, brother of the artist and president of Tarpenning-LaFollette, reminded the city that Tarpenning-LaFollette paid for the sculpture and that the company had an agreement with the city’s department of Metropolitan Development that dictated any possible removal of the work. The Tarpenning-LaFollette Co. offered to donate the sculpture to the city, on the condition that the city would agree to assume the cost of removing the sculpture and would allow the artist input concerning its new

²⁰⁸ VARA 17 U.S.C. § 106A (d)(2).

²⁰⁹ *Pavia*, 623-624..

²¹⁰ *Stuart*, 669.

location.²¹¹ At the closing of the sale of the land, the offer was repeated, and the city stated that the artist would be contacted if it was decided to remove the statue.²¹² However, upon purchasing the land, the city demolished the sculpture without notifying either Tarpenning-LaFollette or Martin.²¹³

In 1995, Martin sued the city for *Symphony #1*'s destruction. In the resulting case, the court found the work to be of recognized stature, and its destruction was found to be a violation of the artist's protected rights under VARA.²¹⁴ The court found that while the agreement was entered into by the parties prior to VARA's adoption, that agreement did not waive any of the rights that would later be protected under VARA. Since the agreement required the city to give notice to Martin before demolition, and the city failed to do so, and nothing was done to suggest that the original agreement was altered, the right to receive notice remained.²¹⁵ On appeal, the Seventh Circuit found that the city's demolition of the sculpture was not a willful violation of Martin's rights under VARA, since the city was apparently unaware that such rights existed.²¹⁶

Another vitally important issue in interpreting VARA is the definition of the phrase 'work of visual art,' which is used in the Act but not defined by it. (U.S. Code Title 17, Chapter 1, Section 101, gives a definition of a 'work of visual art,' but this explanation fails to address many modes of artistic expression, leaving the definition vague and lacking.) Two cases address this definition. The first, *Pollara v. Seymour*, also sought to define the term 'work of recognized stature,' while the second, *Phillips v. Pembroke Real Estate* hinged only on the 'work of visual art' definition. In 1999, the Gideon Coalition, a non-profit legal service, commissioned Joanne

²¹¹ Stuart, 670.

²¹² *Martin v. City of Indianapolis*, 192 F.3d 608, 31 August 1999, 611

²¹³ Stuart, 670.

²¹⁴ *Ibid.*

²¹⁵ *Martin v. City of Indianapolis*, 982 F.Supp. 625, 3 October 1997, 636.

²¹⁶ *Martin* (31 August 1999), 614.

Pollara to create a banner for ‘Lobbying Day’ at Empire State Plaza (ESP), in Albany, NY.²¹⁷

The banner was intended to be hung at the Coalition’s information table.²¹⁸ Pollara, an artist from the Albany area, would often create works of art for hire and had received commissions from the Coalition previously. This specific commission was for a banner to protest funding cuts that would affect the poor’s access to legal counsel.²¹⁹ The finished piece, measuring ten by thirty feet, depicted people of various ethnicities attempting to obtain legal services.²²⁰ The phrases “Executive Budget Threatens the Right to Counsel” and “Preserve the Right To Counsel, Now More Than Ever” also appeared on the work.²²¹

Pollara installed the piece at ESP on the assumption that the Coalition had obtained the proper permit.²²² However, the Coalition had not done so, and thus was not allowed to hang the banner overnight at ESP.²²³ Thomas E. Casey, the Plaza Manager at ESP for the New York State Office of General Services (OGS), ordered that the banner be removed by ESP employees.²²⁴ In the process, the work was torn into three pieces, badly crumpled, and left in Casey’s office.²²⁵ This is where Pollara claims to have found the work the next day when she returned to ESP, though Casey and his supervisor disputed this, stating the banner was carefully rolled up and stored for the artist to retrieve.²²⁶

Pollara brought an action against Casey and his supervisor, the Commissioner of OGS, Joseph J. Seymour. The defendants took the stance that Pollara had illegally placed the banner at ESP and the mural was not a ‘work of recognized stature’ because it was never viewed by the

²¹⁷ Thurston, 711.

²¹⁸ Stuart, 660.

²¹⁹ *Pollara v. Seymour*, 150 F.Supp.2d 393, 18 July 2001, 394.

²²⁰ Stuart, 660.

²²¹ *Pollara* (18 July 2001), 395.

²²² *Ibid.*

²²³ Stuart, 660.

²²⁴ *Pollara* (18 July 2001), 395.

²²⁵ Thurston, 712.

²²⁶ *Pollara* (18 July 2001), 395.

public. On the first point, the defendants maintained that VARA does not provide protection of works which are illegally placed on property belonging to others; however, there was no basis in the statute or case law which would uphold this argument and it was rejected by the court. On the second point, the case hinged on what would qualify as a ‘work of recognized stature.’²²⁷

The District Court found that VARA in general and this term in particular meant to protect both society’s general interest and the artist’s economic self-interest in the protection and preservation of artworks of merit. The court realized that experts may recognize the importance of a work after its destruction, especially if the artist has previously demonstrated a high reputation in the artistic community. In such a case, which is demonstrated in *Pollara v. Seymour*, the purpose of preservation found in VARA can be served, even if the work has not been displayed and the merits of the work are debatable. This is especially true in light of the fact that the artist’s interest in the preservation of the work is the same both prior to and after public display. Based on the complexity of the issue, the court decided that the question of whether the work was of recognized stature would be decided during the following trial.²²⁸

In the 2002 bench trial, the fact that VARA does not define the term ‘work of recognized stature’ created a difficulty in deciding whether Pollara’s banner, which was never on public view, would qualify as such. Previous cases had relied on the opinions of art experts, which were not available due to the banner’s destruction. Experts at the bench trial did recognize the merit of the work, but it was also recognized that Pollara never intended to display the work subsequent to the Gideon Coalition’s event. This suggested that even if the defendants had not destroyed the work, it would have never achieved ‘recognized stature,’ because it would never have been displayed again. Based on this, the trial court found that Pollara failed to meet her

²²⁷ *Pollara* (18 July 2001), 395-397 and fn. 4.

²²⁸ *Pollara* (18 July 2001), 397 and fn. 7.

burden to demonstrate that the banner was eligible for VARA protection as a ‘work of recognized stature.’²²⁹

Additionally, during the bench trial the defendants argued that the banner was not protected by VARA because it constituted a promotional piece.²³⁰ Depending on the definitions of ‘advertising’²³¹ and ‘promotion’²³² in the *American Heritage Dictionary*, Pollara’s work was found by the court to be ‘promotional’ in nature based on its subject matter and the fact that the artist stated the work had no economic value outside of its use to the Gideon Coalition’s event at ESP. Therefore, the banner could not be considered a ‘work of visual art’ and was excluded from VARA protection. Based on Pollara’s failure to prove the essential elements of her *prima facie* (or, open and shut) case, her case against Seymour and Casey was dismissed.²³³ The finding was affirmed on appeal.²³⁴

The second case in which an attempt was made to define the term ‘work of visual art’ was the *Phillips* case. In 1999, David Phillips was contracted by Pembroke Real Estate, Inc. to create and install multiple sculptures in South Boston’s Eastport Park.²³⁵ As part of the development of the World Trade Center East office building, Pembroke had previously hired the landscape architect Craig Halvorson to design the landscape and a pergola for the New Congress Street side of the park. Additionally, Pembroke had acquired sculptures from Phillips and two other artists, Judy McKie and Susumu Shingu. The 1999 contract called for Phillips to provide twenty-six additional sculptures. Fifteen were to be abstract works in granite or bronze, and eleven would be realistic bronze sculptures depicting crabs, shrimp, and frogs. There was also a

²²⁹ *Pollara v. Seymour*, 206 F.Supp.2d 333, 30 May 2002, 336-337.

²³⁰ Thurston, 712.

²³¹ “...the act of attracting attention to a product or business,” reprinted in *Pollara* (30 May 2002), 337.

²³² “...advertising or other publicity,” reprinted in *Pollara* (30 May 2002), 337.

²³³ *Pollara* (30 May 2002), 337-338.

²³⁴ *Pollara v. Seymour*, 344 F.3d 265, 19 September 2003, 271.

²³⁵ Robbins, 395.

separate contract between Phillips and Pembroke, titled the ‘Eastport Park Stonework Agreement,’ which called for the creation of stone walls and split granite paving for the park to be designed by Phillips. As required by the two contracts, Phillips delivered the sculptures and stonework, and Eastport Park was completed in spring 2000.²³⁶

In 2001, Pembroke began renovations to the park.²³⁷ British landscape architect Elizabeth Banks was brought on by Pembroke to design the new landscaping. On 24 January 2002, Pembroke met with Phillips to discuss the changes, which included removing his sculptures from the park. Phillips was against the plan, and proposed conditions on the sculptures’ relocation. Attempting to address Phillip’s concerns, Pembroke had its design team revisit the plans in order to find a way to keep the sculptures in the park. The revised plans were sent to Phillip’s legal counsel on 10 January 2003. In these new plans, all of Phillips’ sculptures would be kept in their original locations, with the exception of one work, which would be moved a few feet in order to accommodate a new sidewalk along D Street. In addition, a bronze plaque that had been designed by Phillips would need to be relocated, and his suggestion for a new position was solicited. Works by the other artists were proposed to be relocated, including five by McKie and the removal of Halvorson’s pergola. At this point, construction was planned to begin fall 2003 and be completed by spring 2004. Phillips waited six months to respond, communicating to Pembroke through his lawyer on 23 July 2004, at which point he conveyed his “serious reservations” with the plans. Konstantine Krekis, a member of the original design team who was working with Pembroke on the park’s redesign, met with Phillips at Eastport Park on 29 July 2003, to discuss Pembroke’s plans. Phillips did not object to the moving of a sculpture to install a sidewalk along D Street. Changes were also planned for Phillips’ walkways, but the

²³⁶ *Phillips v. Pembroke Real Estate, Inc.*, Not Reported in F.Supp.2d, 2003 WL 23119765, 19 August 2003, 1.

²³⁷ Robbins, 395.

walls were all intended to be left in place. However, after the 29 July visit, Phillips reiterated his concerns and threatened suit against Pembroke.²³⁸

Phillips's assertion was that each work in the park was a singular piece of an integrated whole visual artwork. This supposedly-single artwork included not only Phillips' sculptures and the surrounding landscape and walkways, but also the sculptures and works of the other artists represented within Eastport Park.²³⁹ In response to Phillips' motion for a temporary restraining order, Pembroke filed a motion on 19 August 2003, stating that Eastport Park as a whole (sculptures, walkways, and landscape combined) was not a work of visual art that could receive protection under VARA, the park was not copyrightable, and the park provided what amounted to a public presentation of Phillips' sculptures.²⁴⁰ This last charge is significant, as VARA expressly states that

“The modification of a work which is the result of conservation, *or of the public presentation, including lighting and placement*, of the work is *not a destruction, distortion, mutilation, or other modification* described in subsection (a)(3) unless the modification is caused by gross negligence [emphasis added].”²⁴¹

Because of the importance of this section in the Act, and its impact on Eastport Park, Phillips unsurprisingly claimed that the work did not fall under this ‘public presentation’ exclusion.²⁴² Phillips was also relying on the state protections available in the Massachusetts Art Preservation Act (MAPA), which he claimed would prevent the alterations to Eastport Park, even if VARA failed to provide protection. However, Pembroke argued in their 29 April 2003, motion that

²³⁸ *Phillips* (19 August 2003), 2-3.

²³⁹ Robbins, 396.

²⁴⁰ *Phillips* (19 August 2003), 4-5.

²⁴¹ VARA 17 U.S.C. § 106A (c)(2).

²⁴² Robbins, 396.

Phillips failed to provide any indication that the park would be considered a work of fine art under the Massachusetts Act.²⁴³

The Massachusetts District Court issued a temporary restraining order on 21 August 2003, to remain in effect until 18 September 2003, in order to allow the District Judge time to hold an evidentiary hearing.²⁴⁴ The restraining order was later extended, as both Phillips and Pembroke continued to file additional documents supporting their cases. The new temporary restraining order was to last until the District Court could review these new documents and rule on their merits.²⁴⁵

In hearing the case, the District Court Judge found that Phillips did establish that the sculptures on the park's northwest to southwest axis likely constituted an integrated 'work of visual art,' but did not agree that the park as a whole was a 'work of visual art.'²⁴⁶ The works along this axis had an integrated marine theme, recurring spiral motifs, and the use of recurring materials in the form of marine granite boulders and pavers. These recurring themes and materials suggested to the court a unified whole. As for the other sculptures throughout Eastport Park, the court felt that these were individual pieces that were not integrated with the other works.²⁴⁷ The sculptures along the northwest to southwest axis, as an integrated artwork eligible for VARA coverage, would be protected from alteration, mutilation, or destruction, but Pembroke would be permitted to move them within the landscape. However, MAPA protection prohibited their being moved, thanks to the broader protections afforded under the state Act.²⁴⁸

²⁴³ *Phillips* (19 August 2003), 6-7.

²⁴⁴ *Phillips v. Pembroke Real Estate*, Not Reported in F.Supp.2d, 2003 WL 23119763, 21 August 2003, 1.

²⁴⁵ *Phillips v. Pembroke Real Estate*, Not Reported in F.Supp.2d, 2003 WL 23119762, 2 October 2003, 1.

²⁴⁶ *Phillips v. Pembroke Real Estate*, 288 F.Supp.2d 89, 24 October 2003, 89.

²⁴⁷ Stuart, 666.

²⁴⁸ Thurston, 710.

Based on the ‘public presentation’ exclusion in VARA, the judge found that Phillips’ had no right to placement within the park, though she did concede that the artist established a likelihood of succeeding in this matter if tried under MAPA.²⁴⁹ MAPA was believed to possibly provide protection, as it was in the court’s opinion that the removal or destruction of Phillips’ work would damage the artist’s reputation as an artist, something MAPA is intended to prevent. The court’s reading of VARA suggested that the Act might provide protection for site-specific work, but this protection was in some way limited by the ‘public presentation’ exclusion.²⁵⁰ This court’s decision was the first to address site-specific artwork under VARA, and in its decision, it denied VARA’s right of integrity for site-specific art.²⁵¹

The Supreme Judicial Court of Massachusetts (Suffolk), which heard the case on 7 September 2004, found that MAPA did not provide any protection to the components of site-specific artworks from being removed from their location, even if doing so would result in the conceptual (if not physical) destruction or decontextualization.²⁵² As long as the work would not be physically destroyed, removal was permitted under the state Act.

The case was appealed to the First Circuit, at which time it was definitely decided that VARA does not provide protection to site-specific artworks, thereby affirming the Supreme Judicial Court of Massachusetts’ decision.²⁵³ However, the First Circuit affirmed the decision on grounds other than those on which the previous court’s arguments had been based.²⁵⁴ The First Circuit instead came to the conclusion that VARA treated site-specific art in the same way as integrated art, while also recognizing that the two categories of artworks were inherently

²⁴⁹ *Phillips* (24 October 2003), 89.

²⁵⁰ Stuart, 666-667.

²⁵¹ Robbins, 401.

²⁵² *Phillips v. Pembroke Real Estate*, 443 Mass. 110, 819 N.E.2d 579, 21 December 2004, 579.

²⁵³ *Phillips v. Pembroke Real Estate*, 459 F.3d 128, 22 August 2006, 128.

²⁵⁴ Stuart, 668.

different.²⁵⁵ This would mean that VARA does not provide any protection to site-specific works.²⁵⁶ The reasoning for this decision was twofold. First, the court was not persuaded by the District Court’s reading of VARA that would provided protection to site-specific art while limiting such protection through the ‘public presentation’ exclusion.²⁵⁷ As the court phrased it,

“By concluding that VARA applies to site-specific art, and then allowing the removal of site-specific art pursuant to the public presentation exception, the district court purports to protect site-specific art under VARA’s general provisions, and then permit its destruction by the application of one of VARA’s exceptions. To us, this is not a sensible reading of VARA’s plain meaning. Either VARA recognizes site-specific art and protects it, or it does not recognize site-specific art at all.”²⁵⁸

Second, the court did not accept Phillips’ argument that VARA’s ‘public presentation’ exclusion should somehow be interpreted to not apply to site-specific works.²⁵⁹ This again goes back to how VARA should be read and interpreted by artists and commissioning parties.

The *Flack* case would hinge on two fundamental issues concerning VARA, namely, the meaning of the phrase ‘distortion, mutilation, or other modification’ of a work of visual art as it is used throughout the Act, and what is meant by repair or ‘conservation’ as it is used in the Section (c)(2) exception. Audrey Flack, the accomplished painter and sculptor, was commissioned in 1992 by the not-for-profit corporation Friends of Queen Catherine, Inc. (FQC), to design a colossal sculpture of Catherine of Braganza, the seventeenth-century Princess of Portugal and Queen of England, as well as the namesake of Queens Borough in New York. The sculpture was to be installed in the Hunters Point Redevelopment Project in Queens on the East River. Flack won the commission after participating in an international competition, and the final work was to be a thirty-five foot tall bronze sculpture. Flack was verbally told that she

²⁵⁵ Robbins, 401.

²⁵⁶ Stuart, 668.

²⁵⁷ Robbins, 401.

²⁵⁸ *Phillips* (22 August 2006), 140.

²⁵⁹ Robbins, 401.

would receive \$300,000 for the commission and a contract would be forthcoming. Three years later, on 24 June 1995, the contract was finally presented to Flack, in which the design fee was reduced to \$125,000.²⁶⁰

In June 1996, FQC commissioned Tallix, Inc. to fabricate the four bronze sculptures honoring Queen Catherine. Flack was not involved in the agreement between Tallix and FQC, though she was named in the agreement as the commissioned artist who would “design and advise with respect to the fabrication and installation of a 35’ bronze sculpture honoring Queen Catherine of Braganza.”²⁶¹ Flack completed the first three of the four intended sculptures at Tallix, and in 1996 through 1997, she began work on the final sculpture. On 8 November 1997, she approved the final clay sculpture and authorized its use to create the molds to be used for casting.²⁶²

By this time, a controversy had arisen over the project, as it was alleged that Queen Catherine and her family had profited from the slave trade. It was suggested in the community that the project had not been subjected to a proper review process prior to the start of work. Then-President of Queens Borough, Claire Shulman, responded to the complaints by publicly declaring in February 1998 that the East River site that had been provided for the project would no longer be available. The following month, Tallix ceased work on the project amid concerns about the feasibility of FQC to accommodate the final statue. When FQC could provide no assurances to Tallix that the statue could be received by FQC, Tallix terminated the agreement, pursuant to paragraphs 17a(iii) and 17a(v) of the contract between the two parties. A new agreement was entered into between Tallix and FQC on 29 January 1999, which provided for Tallix to complete the final statue. This new agreement did not mention Flack, and required that

²⁶⁰ *Flack v. Friends of Queen Catherine Inc.*, 139 F.Supp.2d 526, 19 April 2001, 529.

²⁶¹ Agreement reprinted in part in *Flack*, 529.

²⁶² *Flack*, 529-530.

Tallix only speak with FQC's President, Manuel Andrade Sousa. Due to this agreement, Flack was barred from supervising the fabrication or having final approval of the molds and the finished work after March 1998.²⁶³

In March 1999, Flack learned that the molds and wax models that would be used to cast the final bronze statue had been damaged, and new molds would be required to complete the project. The face for the planned sculpture had also been damaged, and a new clay face would be created in order to create the replacement molds. Flack offered to repair the face for an additional fee, but FQC instructed Tallix to instead hire David Simon, an assistant to Flack, to resculpt the face. Simon was not trained in sculpture conservation or in the necessary skills to sculpt a new face. According to Flack's complaint, the resulting work featured uneven and improperly sized facial features, including the nose, eyes, and lips. Despite this, FQC President Sousa authorized Tallix to cast the statue's head. The head was to be shipped to FQC on 30 October 1999, and the entire figure was to be assembled by the end of that year.²⁶⁴

A temporary restraining order prohibiting the casting of the head was issued following Flack's commencement of legal action in September 1999. Flack asserted three separate claims under VARA. She argued that the means of storage of the sculpture, in what she described as Tallix's "garbage dump," had led to a partial destruction of her work. Flack also claimed that Simon's reconstruction of the clay head was a partial destruction. Finally, Flack asserted that Simon's modification and FQC's authorization for casting both were done without her approval. For the first claim, the court accepted the defendant's argument that VARA does not protect against modifications to a work based on "the passage of time or the inherent nature of the materials," even if leaving the clay sculpture outdoors was found to be "grossly negligent" or

²⁶³ Ibid., 530.

²⁶⁴ Ibid., 530-531.

“intentional.”²⁶⁵ Regarding Flack’s second claim, concerning Simon’s resculpting of the face, the court again sided with the defendants, accepting their argument that Simon was hired to conserve, not modify, the sculpture’s face. However, VARA does not protect conservation treatments that are not found to be grossly negligent, which may have been the case with Simon’s work. For the third VARA allegation, Flack referenced what she perceived as VARA’s protection of an artist’s right to compel a party commissioning a work to be required to complete and maintain the work if it is left in an unfinished state. However, the court found that based on *Carter v. Helmsley-Spear, Inc.*, VARA merely mandates preservation and does not require creation. According to *Carter*, VARA does not provide protections to works which do not yet exist, thereby causing Flack’s third claim to be dismissed by the court.²⁶⁶ In the end, FQC decided to not install the statue, and it was returned to the artist.²⁶⁷

In the *Scott* case, the court would revisit the issue of defining the term ‘work of recognized stature,’ previously litigated in *Carter* and *Pollara* and thereby giving the most recent example of how the term is being defined in the courts. In 1991, Peter and Candida Dixon approached Suffolk County, NY, artist Linda Scott to commission a sculpture for the backyard of their property Swan’s Way. The Dixons wanted a sculpture of a swan to decorate the property. Scott created a forty-foot long, ten-foot high, 6,000-pound sculpture of a swan, painted white, which was delivered to Swan’s Way in May 1992. While the sculpture was on the property, the Dixons were responsible to paint and maintain it, the work being done by caretakers employed by the couple. Because it was in the backyard, the sculpture was not visible to the public, and

²⁶⁵ *Flack*, 531-534 and VARA 17 U.S.C. § 106A (c)(1).

²⁶⁶ *Flack*, 535.

²⁶⁷ *Tacha*, 3.

the Dixons did not open their property up to the general public at any time. The property was surrounded by twelve-foot-high hedges which blocked the view of the yard and the sculpture.²⁶⁸

At some point in 1999, Peter Dixon decided to sell the Swan's Way property, and on 25 March of that year, the property was sold to Sidney and Elizabeth McHugh Khan. A rider to the contract stated that the Dixons would remove the "large steel structure of swan in flight prior to closing."²⁶⁹ Mr. Khan passed away prior to the closing, and the property was sold to Denise Rich. Before the closing, the swan sculpture was removed from Swan's Way. Mr. Dixon testified that he notified Scott of the removal beforehand, but Scott testified that she did not learn of the sculpture's removal until after the fact. Mr. Dixon paid a construction company, Rambo, Inc., \$5,400 to remove the sculpture to the company's property for three years. The Dixons' lawyer told Scott that they would be willing to give her the sculpture, though they would not be willing to pay for the transportation of the work. Scott asked the Dixons to pay to move the sculpture to a museum on Long Island, but the Dixons again refused to pay for transportation of the artwork. In 2003, Scott filed suit against the Dixons in the Eastern District of New York. Scott was seeking damages against the Dixons for the destruction of Scott's 'work of visual art.'²⁷⁰

David Morris, a friend of Scott, went to the Rambo storage yard to view the sculpture. There, he found it stored outside on the ground, where it had begun to rust and had become covered in vines. Morris, who worked in construction, determined that the rust damage to the sculpture was beyond restoration, as was the one wing which had been bent. Despite testimony offered by Carl Schwartz, a metallurgical engineer presented by the Dixons, the court agreed with Morris' opinion. However, a major problem with Scott's case was that VARA provides

²⁶⁸ *Scott v. Dixon*, 309 F.Supp.2d 395, 19 March 2004, 396-397.

²⁶⁹ *Ibid.*, 389.

²⁷⁰ *Ibid.*, 396-399.

protection of visual artworks of ‘recognized stature.’ The sculpture had only been mentioned once in publication, and that was in passing in an article mainly about the Dixon’s property. No art expert could be found to testify on Scott’s behalf as to the artistic merit of the work. Scott not only did not produce an expert witness to speak to the sculpture’s artistic merit, but also went so far as to testify that she was unaware of a single artistic critique of the work. The *Pollara* case had already demonstrated the difficulty in establishing artistic merit in a comparable situation.²⁷¹ Based on the artist’s inability to establish that the artwork was of a recognized stature among the artistic community, the judge found in favor of the Dixons.

The final case to be discussed here is *Peker*, which raised the question of what protection VARA provides artists in reference to unapproved reproductions. The artist Elya Peker registered copyright on 19 January 1990 for a selection of his oil paintings, including *Flowers in Basket*, *Big Bouquet of Flowers on Marble Table*, and *Flowers in Jug*. The following year, he entered a licensing agreement with Galaxy of Graphics, Ltd., granting the company licensing rights to reproduce these paintings as posters. Peker would receive a \$250 advance for each painting reproduced in poster format, plus a ten percent royalty on each poster sold.²⁷²

Masters Collection is a company that purchases poster prints of paintings, attaches a canvas backing, and coats the surface with a clear gel to mimic brushstrokes and impasto on the surface.²⁷³ Between March 1993 and October 1994, the company purchased at least twenty-one posters of Peker’s work *Flowers in Basket*, paying \$4.50 or \$5.00 for each poster. Between December 1991 and January 1992, Masters Collection also purchased at least six posters of *Flowers in Jug* and three posters of *Big Bouquet of Flowers on Marble Table*, paying \$7.50 for

²⁷¹ *Ibid.*, 397-400.

²⁷² *Peker v. Masters Collection*, 96 F.Supp.2d 216, 16 May 2000, 217.

²⁷³ Jeffrey P. Cunard, “From the CAA Counsel: Moral Rights for Artists: the Visual Artists Rights Act,” *CAA News* (May/June 2002), 6-8, 6.

each poster. The posters were transformed into oil painting replicas by the company and placed in museum-quality frames prior to sale. Fifteen replicas of *Flowers in Basket* were sold for various prices ranging up to \$322.15. At least two replicas of *Big Bouquet of Flowers on Marble Table* were sold for approximately \$194.00. Masters' president, Gregory Panjian, stated in a sworn affidavit that no other posters depicting Peker's works were used by the company.²⁷⁴

Peker sued Masters, claiming infringement of his copyright protection (for modification of his work) and infringement of his VARA rights.²⁷⁵ Regarding the copyright claim, Peker needed to establish both that he owned the copyright to the works and that Masters engaged in unauthorized reproduction of those copyrighted works. Peker's copyright registration of the paintings served as *prima facie* evidence supporting his ownership of valid copyright, making the issue of unauthorized copying on the part of Masters the only issue for the copyright claim.²⁷⁶ In a previous case, it was determined that "substantial similarity does not require literally identical copying of every detail."²⁷⁷ Rather, a level of similarity necessary to establish a claim would be found if "an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."²⁷⁸ The court found that Masters did have access to Peker's works, that copies of Peker's works were used in the replication process, that the final Masters' replicas were 'substantially similar' to the original copyrighted works, and that Masters was creating these replicas without Peker's permission. Based on case histories which created precedent, the District Court found that Masters' replicas were not derivative and did infringe on Peker's copyright.²⁷⁹

²⁷⁴ *Peker* (16 May 2000), 217-218.

²⁷⁵ *Cunard*, 6.

²⁷⁶ *Peker* (16 May 2000), 218.

²⁷⁷ *Rogers v. Koons*, 960 F.2d 301, 2 April 1992, 307.

²⁷⁸ *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 23 May 1966, 1022, quoted in *Rogers*, 307.

²⁷⁹ *Peker* (16 May 2000), 219-221.

In considering Peker's second claim of VARA infringement, the District Court dismissed the claim, since Masters' modification was to posters depicting the artworks, not to the artworks themselves.²⁸⁰ The court found that VARA's language clearly demonstrated that the Act had no application to the case, specifically quoting that a 'work of visual art' is a "painting ... existing in a single copy," while excluding posters.²⁸¹

The cases covered here provide an indication of just how complex VARA can be in regards to interpretation and application. Issues of defining terms and phrases in the Act have been approached by the case law, but the Act still leaves questions and areas of ambiguity. It is only with more cases trying the various aspects of the Act that these ambiguities will be resolved. If and when bright line rules are established, definite clarity on these issues will exist to provide guidance. Until then, artists and those owning, purchasing, or commissioning artworks are best served to rely on clearly-worded and legally-enforceable contracts to best serve the interests of all parties involved.

²⁸⁰ Cunard, 6.

²⁸¹ 17 U.S.C. §101.

CHAPTER 4: THE IMPLICATIONS OF VARA FOR COLLECTING INSTITUTIONS

While the examples in the previous chapter were drawn from cases concerning public, corporate, and private commissions and acquisitions, their relevance to museums is clear. Each of the examples deals with the rights of artists to protect the integrity of their work once it has passed out of their legal possession of ownership. Since museums both commission and acquire (purchase or are given) works of art produced by living artists, they are bound by VARA legislation just as all other patrons and collectors, even though they are not mentioned specifically in the Act.

With very few exceptions, there are no laws that directly and exclusively relate to museums. Instead, a variety of laws, drawn from across the legal spectrum, affect the complex entity which is a museum. Museums are bound by areas of employment law, foreign import and export law, tax law, and so on.²⁸² For example, the laws governing what objects may and may not be imported into the United States affect museums. Even though they do not specifically state “museums may not import...,” museums are still held to those laws. In the same manner, VARA pertains to museums though it does not specifically address museums and collecting institutions. Similarly, it also does not address private collectors such as the Dixons, not-for-profit organizations as in the *Flack* case, or for-profit corporations such as Pembroke Real Estate. However, all have had legal actions brought under VARA. The Act addresses what rights artists do and do not have in their works and as institutions that collect, preserve, and display artworks, museums are responsible to be in compliance with VARA. While most of the cases that address the Act, thus far, have not involved a museum, it still holds true that museums need to be

²⁸² Stephen E. Weil, “Vincible Ignorance: Museums and the Law,” 1983, ed. Robert C. Lind, Robert M. Jarvis, and Marilyn E. Phelan, *Art and Museum Law: Cases and Materials* (Durnham, NC: Carolina Academic Press, 2002), 435.

cognizant of how these cases came about, what the results were, what those results mean for future interpretations of the Act, and how to learn from those results so that the museum can conduct its business with artists both legally and ethically, thereby attaining a level of ‘best practice’ in regards to upholding artists’ rights.

One might think that museums are less affected by VARA because they seldom commission works and more often than not acquire works through purchase or donation. While many of the cases discussed in the previous chapter, indeed, involved works that had been commissioned, VARA protection also extends to artworks that are donated, inherited, or purchased, either at auction, from an individual, or from a dealer. *The means of acquisition has no bearing on VARA’s application.* For instance, the Alexander Calder example discussed above, concerning a mobile donated to and redesigned by the ACDA, would today be an actionable issue under VARA. In that pre-VARA example, the Calder mobile was donated to ACDA by a private collector. However, the alterations made to the mobile by ACDA, specifically repainting it in different colors and motorizing it, would likely be considered an “intentional distortion, mutilation, or other modification” with the effect to be “prejudicial to [the artist’s] honor or reputation.”²⁸³ It would not matter that the ACDA received ownership of the mobile through a donation. The actions of that agency would still be an infringement towards Calder’s federally-protected moral rights under the law. As this example demonstrates, VARA affects any owner of a ‘work of visual art’ whose author is still living and whose moral rights protected by VARA have not been waived in writing as described in Section (e)(1) of the Act.

However, among all institutions, public and corporate, that are impacted by VARA, museums are placed in a special circumstance. This is because museums as a whole have chosen

²⁸³ VARA 17 U.S.C. § 106A (a)(3)(A).

to ‘live by’ special Codes of Ethics, as promulgated by organizations such as the American Association of Museums (AAM), the Association of Art Museum Directors (AAMD), the International Council of Museums (ICOM), and other voluntary-membership organizations. Museums are in the situation where they have placed themselves on a higher ethical ground than the average individual or institution. “Museums in the United States are grounded in the tradition of public service. They are organized as public trusts, holding their collections and information as a benefit for those they were established to serve.”²⁸⁴ As public trusts, museums need to maintain a higher level of ethical conduct and transparency than a for-profit corporation or an individual private collector. Museums answer to their constituents, the public, and the public’s representative, the Office of the Attorney General. It is for this reason that organizations such as AAM and ICOM promulgate Codes of Ethics and statements of best practices. As the AAM phrases it,

“The distinctive character of museum ethics derives from the *ownership, care, and use* of objects, specimens, and living collections representing the world’s natural and cultural common wealth. This stewardship of collections *entails the highest public trust* and carries with it the presumption of *rightful ownership, permanence, care, documentation, accessibility, and responsible disposal* [emphasis added].”²⁸⁵

The AAM-promulgated Code of Ethics places an emphasis on ‘permanence’ and ‘care,’ both of which fall under VARA’s protection of integrity. Additionally, VARA’s protection of attribution falls directly under the AAM Code of Ethics statement, as attribution is linked to documentation, which provides both for documenting if and when an object entered the museum’s permanent collection, and also any scholarly research into the artwork including provenance and who created the work.

²⁸⁴ American Association of Museums website, “Code of Ethics for Museums,” <http://www.aam-us.org/museumresources/ethics/coe.cfm>, 2000, accessed 29 April 2008.

²⁸⁵ Ibid.

Let us now consider how some of the cases discussed in the previous chapter might be relevant for museums. Athena Tacha's work *Memory Path* was commissioned by, and installed in, the city of Sarasota, FL, but the resulting legal battle is of concern to all museums that are considering installing permanent sculpture in their institution. The outcome of that battle, with *Memory Path* to be restored yearly by the city and not destroyed, is in marked contrast to Tacha's battle to save her work *Marianthe*. While the legal battle to save this work began after the passage of VARA, the work predated the law, and Tacha ultimately lost her fight to save *Marianthe*.²⁸⁶ The two Tacha examples highlight the importance of the commissioning institution to have a full understanding of the scope of the commissioned work and the future requirements of upkeep. Specifically, the commissioning institution, whether it is a museum, government agency, or independent corporation, need to be aware of what is the artist's intent concerning future upkeep (or lack thereof). For instance, it is important to address problems of replacing portions should they fall victim to weather conditions, the passage of time, or inherent vice.

Pavia and *Martin* serve as reminders that the VARA effective date is not a hard line drawn in time, before which nothing is protected and after which everything is. VARA does provide retroactive protection in a limited number of cases, requiring the owners to pay careful attention to subjects beyond simply upkeep. For instance, a museum needs to have firm documentation detailing not only when a work entered the collection, either as an accessioned object or as a loan, but also if or when the title of the work passed to the institution. While the documentation of such transactions are already common practice among museums and an

²⁸⁶ Tacha, 3.

expectation of AAM's Accreditation Commission,²⁸⁷ the VARA issues raised provide an additional incentive for this aspect of collections care.

Phillips v. Pembroke stands out as an important case, because it established the standards concerning the types of artworks that were protected under both VARA and the Massachusetts statute, MAPA.²⁸⁸ For both Acts, *Phillips* was a case of first impression regarding an artist's ability to preserve a site-specific work which is created for presentation in a public space.²⁸⁹ The case also demonstrates the ambiguity inherent in the wording of VARA. The different Sections are open to interpretation, and that interpretation can lead to conflicting readings of the Act. Museums should rely on careful wording of contracts, and not the muddled text of VARA, when commissioning artworks. It is not enough to trust the wording of the Act to provide protection, as that wording is subject to interpretation by judge or jury if the situation ever goes to court. Instead, using the Act's wording as a starting point, institutions need to enter carefully-worded legal documents, preferably drafted by legal counsel who is familiar with the special needs and concerns of museums and artists. Such documents can ensure that not only are all parties properly protected, but also that everyone has reached an understanding and consensus on what the parties' relationship is and what is expected of each side.

The *Flack* case raises important issues relating to preservation and conservation of artwork, two mandates which often appear in museum mission statements. While VARA provides protection against 'grossly negligent' conservation treatments, an exact definition for

²⁸⁷ American Association of Museums Accreditation Program, "The Accreditation Commission's Expectations Regarding Collections Stewardship," 17 December 2004, <http://aam-us.org/museumresources/accred/upload/Collections%20Stewardship%20ACE%20%282005%29.pdf>, accessed 2 May 2008.

²⁸⁸ Stuart, 665.

²⁸⁹ Thurston, 708.

the term does not exist. The American Institute of Conservation (AIC)'s Code of Ethics and Guidelines for Practice state that

“The conservation professional should be *cognizant of laws and regulations* that may have a bearing on professional activity. Among these laws and regulations are those concerning the *rights of artists* and their estates, occupational health and safety, sacred and religious material, excavated objects, endangered species, human remains, and stolen property [emphasis added].”²⁹⁰

The AIC's Code of Ethics do not go into greater detail, thereby providing little in the way of guidelines for conservators. The AAM does not approach the topic of VARA and conservation in their Code of Ethics, and despite various specialized Ethical Guidelines, this topic is not presented.²⁹¹ For lack of stricter guidelines, museums are perhaps best advised to follow the AIC recommendations for selecting a conservator, especially in view of the organization's warnings regarding exercising caution in the selection process.²⁹²

The problems inherent in defining a ‘work of recognized stature’ are of particular interest to museums and were of central concern in the *Scott* case. Many objects in museum collections reside in storage, where they may not be viewed by the general public or academics. If an object is allowed to linger indefinitely in storage, it may, based on case law, not attain a level of artistic merit necessary to gain VARA protection. Not only does the stored object not necessarily add to the museum's prestige, since it is not on display and perhaps is not even know to the public, but the standing of the artist is not increased. Issues of museum storage and rotating display are for the most part problems of staffing, space, and funding, but this issue adds another dimension to the VARA problem.

²⁹⁰ American Institute of Conservation's Code of Ethics and Guidelines for Practice, <http://aic.stanford.edu/pubs/ethics.html>, accessed 12 April 2008.

²⁹¹ American Association of Museums various codes and ethical guidelines available online at <http://aam-us.org/museumresources/ethics/index.cfm>, accessed 8 April 2008.

²⁹² American Institute of Conservation's Guidelines for Selecting a Conservator, <http://aic.stanford.edu/public/select.html#five>, accessed 12 April 2008.

The *Peker* case throws light on the fact that while VARA falls under Title 17 (Copyrights) of the United States Code, protection under copyright does not automatically mean equal protection under VARA. Museums need to recognize that while VARA is a section of the copyright code, the moral rights of VARA are philosophically and legislatively separate. If an artist grants an institution full copyright, or, more likely, a nonexclusive license, the artist still maintains her moral rights protection. Even if an artist places her work in the public domain, she has not waived her VARA rights.

Museums can best serve their own interests, as well as those of the artists and communities, by clearly addressing the rights afforded by VARA for commissions, loans, and acquisitions. Additionally, museums should keep in mind that there is no definite cut-off date, before which VARA is not an issue. A work created years or even decades before VARA was enacted can receive retroactive protection under certain circumstances. The complexities of VARA need to be recognized, acknowledged, and addressed whenever necessary in order to best avoid potential litigation and damaging the institution's relationship with artists, the public, and potential donors.

What happens if museums ignore VARA and do not write careful contracts in which the Act is taken into account is demonstrated by the recent case of *Mass MoCA v. Büchel*. In August 2006, the Swiss artist Christoph Büchel visited the Massachusetts Museum of Contemporary Art (Mass MoCA), an institution located in North Adams, MA.²⁹³ The artist claims he was invited by Mass MoCA in order to discuss a possible installation piece, though the museum denies that

²⁹³ *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel*, Civil Action No. 3:07-30089MP, "Answer and Counterclaims of Christoph Büchel," 2 July 2007, 10.

they invited Büchel.²⁹⁴ During the visit to Mass MoCA, Büchel presented a model for a proposed installation artwork, with the intended title *Training Ground for Democracy*. The work would consist of several independent artworks which would need to be displayed together and in their entirety to present the complete installation piece. According to the artist, Mass MoCA agreed to fund the work, to provide technical and logistical support, and to procure any necessary materials. While there was email exchanges between the museum and the artist, Mass MoCA did not enter into a written agreement with Büchel, and, according to the artist, no budget was discussed between the parties.²⁹⁵ (Later, the presiding judge would state, “a second-year law student could have drafted a contract that would have eliminated 90 percent of the problems the parties are now arguing about.”)²⁹⁶

In preparation of the intended 16 December 2007 opening, Büchel resided in North Adams, MA, from late August to early September 2006, as well as from late October through 17 December 2006. However, the work was not completed in time for the planned December opening, and the artist returned to Basel, Switzerland, to celebrate the Christmas holidays. Mass MoCA informed Büchel in late December 2006 that the institution had failed to raise the necessary funds to complete *Training Ground for Democracy*, and it was the museum’s intention to bring the project to an end. According to the artist, it had always been his intention to return to Mass MoCA after the holidays to complete work for a rescheduled opening on 3 March 2007. However, the funding problems made his return unnecessary. After notifying Büchel that the project could no longer be funded, Mass MoCA filed a complaint seeking to not just cease work

²⁹⁴ *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel*, Civil Action No. 3:07-30089MP, “Plaintiff’s Reply to Defendant’s Counterclaims,” 12 July 2007, 2.

²⁹⁵ *Massachusetts Museum of Contemporary Art Foundation, Inc.* (2 July 2007), 10.

²⁹⁶ Geoff Edgers, “Dismantled,” *The Boston Globe*, Home/A&E/Theater/Arts Section, 21 October 2007, http://www.boston.com/ae/theater_arts/articles/2007/10/21/dismantled/?page=1, accessed 22 November 2007.

on the installation, but to allow it to be opened to the public in its unfinished state. In his answer to Mass MoCA's complaint, Büchel accused the museum of making unapproved changes to *Training Ground for Democracy* that distorted the work, and that the museum was allowing public officials, reporters, curators, art critics, and others access to the work without his consent or knowledge.²⁹⁷ Mass MoCA denied these allegations.²⁹⁸ In May 2007, after communications between the museum and the artist had completely broken down, Mass MoCA filed a suit seeking permission to open the incomplete installation to the public.²⁹⁹

In his answer to Mass MoCA's original complaint, Büchel argued that he never waived any of his protections under the Copyright Act 17 U.S.C. §§ 101 *et. seq.*, which includes his rights under VARA.³⁰⁰ Mass MoCA never denied that Büchel had retained these protections during the course of assembling the work and afterwards.³⁰¹ The artist also cited numerous public sources, including *The Boston Globe* and *The New York Times*, which detailed how access had been given to the work by Mass MoCA, and that the tarps which covered the unfinished installation were ineffective. In his answer, Büchel's lawyers stated that

“Büchel designed the Work of Art [*Training Ground for Democracy*] to be not merely a visual but also a physical experience whereby the visitor interacts with the design of the space itself. The ways that a visitor is moved through the Work of Art are as much a part of the meaning of the work as the objects within it. Thus, even if it were fully ‘tarped’ (which it is not), Mass MoCA would nevertheless be publicly displaying Büchel’s unfinished Work of Art.”³⁰²

Büchel alleged that, due to the high level of press interest in the case and the fact that the museum had filed a lawsuit regarding the work, his reputation would be intrinsically tied to the

²⁹⁷ *Massachusetts Museum of Contemporary Art Foundation, Inc.* (2 July 2007), 6-7 and 14.

²⁹⁸ *Massachusetts Museum of Contemporary Art Foundation, Inc.* (12 July 2007), 6.

²⁹⁹ Randy Kennedy, “Massachusetts: Artist Sues to Dismantle His Work,” 3 July 2007, *The New York Times*, U.S. section.

³⁰⁰ *Massachusetts Museum of Contemporary Art Foundation, Inc.* (2 July 2007), 11.

³⁰¹ *Massachusetts Museum of Contemporary Art Foundation, Inc.* (12 July 2007), 3.

³⁰² *Massachusetts Museum of Contemporary Art Foundation, Inc.* (2 July 2007), 14-16.

unfinished artwork, which the public would invariably use to judge Büchel's artistic career despite its unfinished and unapproved status. Based on Section 2 of VARA, the artist attempted to prevent the public display of the work. He also insisted on the protection of his rights under the Copyright Act, specifically Section 106(5), which provides the right to display works publicly, and Section 106(2), which addresses derivative works.³⁰³

In stating its affirmative defenses in the reply to Büchel, Mass MoCA made numerous assertions to justify their actions. Mass MoCA asserted that the museum was a joint owner of the work (and therefore entitled to display the incomplete installation), that the work did not contain enough original expression on the part of Büchel to qualify for copyright protection, that the work was never registered with the United States Copyright Office, that the installation did not qualify as a 'work of visual art' as defined by VARA, that Mass MoCA was operating under the doctrine of fair use, and that the museum at all times operated in good faith and without willfully or intentionally infringing on Büchel's rights.³⁰⁴ The incomplete artwork, which was in the museum's football-field-size contemporary art space called 'Building 5,' included, among other things, a movie theater, a two-storey house, a mobile home, and thousands of found objects.³⁰⁵

According to Mass MoCA, Büchel had spent \$300,000 during the design of the installation and in obtaining objects from which the installation was created. Since the museum had a projected budget of only \$160,000, he had thus doubled the institution's projected

³⁰³ Ibid., 17-22.

³⁰⁴ *Massachusetts Museum of Contemporary Art Foundation, Inc.* (12 July 2007), 16-17.

³⁰⁵ Martha Lufkin, "Mass MoCA Sues Swiss Artist for Right to Show Unfinished Installation," 5 July 2007, *The Art Newspaper*, More section.

expenses.³⁰⁶ Büchel alleged that he had given Mass MoCA the names of various foundations and sponsors from which the museum could possibly secure funding to cover the financial cost of creating *Training Ground for Democracy*.³⁰⁷ However, Mass MoCA denied that Büchel provided any such information.³⁰⁸

Despite the strong indication that Büchel's copyright and moral rights were infringed by Mass MoCA, the Federal District Court in Springfield, MA, ruled in September 2007 that the museum could display Büchel's unfinished work, and the court stated that such a display did not violate VARA or in any way distort, mutilate, or modify the work of visual art. According to the court, as long as the museum made it clear that the work was incomplete, there was no legal basis to prevent its public display.³⁰⁹ Despite its win in court, critics and journalists alleged that Mass MoCA had lost in the so-called court of public opinion, where the museum's actions against the artist were viewed as unethical and questionable.³¹⁰ The museum decided that despite the win which permitted it to display the incomplete work, it would instead remove the work from its property, a deinstallation projected to last approximately five weeks and to cost an additional \$40,000.³¹¹

The cases discussed above show that museums that collect contemporary art must take VARA seriously. They also must decide if legal compliance is enough, or if museums must take a higher ethical stance regarding artists' moral rights. Ultimately, they must come up with a set

³⁰⁶ Ken Johnson, "No Admittance: Mass MoCA has Mishandled Disputed Art Installation," 1 July 2007, *The Boston Globe*, A&E – Theater/Arts section.

³⁰⁷ *Massachusetts Museum of Contemporary Art Foundation, Inc.* (2 July 2007), 11.

³⁰⁸ *Massachusetts Museum of Contemporary Art Foundation, Inc.* (12 July 2007), 4.

³⁰⁹ Randy Kennedy, "Museum Can Show Disputed Artwork, Judge Rules," 22 September 2007, *The New York Times*, Arts – Art and Design section.

³¹⁰ Randy Kennedy, "Accusations, Depositions: Just More Fodder for Art," 2 March 2008, *The New York Times*, Arts – Art and Design section.

³¹¹ Geoff Edgers, "Mass MoCA to Dismantle Disputed Show," 25 September 2007, *The Boston Globe*, A&E – Theater/Arts section.

of profession-wide ‘best practices’ to avoid both legal and ethical problems concerning this
issue.

CONCLUSION: VARA TODAY: RECENT DEVELOPMENTS AND RECOMMENDATIONS FOR THE FUTURE

The cases that have been argued under VARA thus far have helped to establish some interpretation of the Act and have shown how it may affect artists and owners of artworks, whether they are private collectors, for-profit corporations, or non-profit charitable entities. The case history demonstrates that it is not always easy to predict how a case heard under VARA will be decided. The issues are complex, and the wording of the Act provides little guidance. Many of the terms used in the Act are not defined in the text, and the courts have oftentimes struggled to determine what types of works are meant to be protected.

The outcomes of these cases are relevant to any individual or institution that collects artworks by living artists, including American museums. While museums are not explicitly named in the Act, they are clearly affected by the repercussions of the federal protection of moral rights in America. Museums are responsible for following any laws that apply to them, whether they are named within the text of the legislation or not. Just as museums must be compliant with tax law, employment law, and contract law, they must also be compliant with VARA. Fortunately, VARA has had little direct impact on museums in America. Whether it has been luck, good communications, binding contracts, or some other factors, museums, with the notable exception of Mass MoCA (which ultimately was found to be in compliance with VARA), have been able to avoid legal disputes concerning moral rights since VARA took effect in 1990. However, this does not mean that they can ignore the legislation. New cases are constantly being argued and they will, no doubt, create new precedents of which museums must be aware.

Recently, a case which could have had important consequences for museums began to make its way through the courts. It addressed VARA's protection of artists' right of attribution. In 1998, Robert Francis Montgomery, who also goes by the name of Robert Fontaine, was a twenty-year-old art student in Florida. Montgomery found some trash outside the home of artist Robert Rauschenberg on Captiva Island, Florida. Mixed in with the trash were some discarded works, allegedly created by Rauschenberg. The works consisted of two or three chromes (positive color transparencies), each with numerous thirty-by-thirty-inch sheets of negatives. Montgomery, who was attending art school with the assistance of an approximately \$500 Rauschenberg scholarship, used the chromes to create a presentation entitled *Walking with Bob*, which he presented to his art class. Each of the pieces carried Rauschenberg's signature. Montgomery later sold three of the works, and gave away an unknown number over the years. The works, allegedly, were sold through Space 39 Gallery in Fort Myers, FL, (an allegation denied by the gallery owner) and the HW Gallery in Naples, FL. The two works that were sold through the HW Gallery each brought approximately \$2,000, significantly less than the hundreds of thousands to one million plus dollars for which Rauschenberg's works usually sell. Montgomery later claimed that at least two other people took works out of Rauschenberg's trash, suggesting that other similar works may come onto the market. To further complicated the matter, Rauschenberg is known to have allowed other artists to use his large format printer, which could print images up to five feet by eight feet, so there was no guarantee that the works found in his trash were actually his artworks.³¹²

On 28 December 2007, Rauschenberg filed a complaint against Montgomery citing misattribution under VARA. Montgomery was charged with having sold artworks that he

³¹² Mary Wozniak, "Artist Rauschenberg Sues Over 'Art' Taken From his Trash," *USA Today*, 28 February 2008, http://www.usatoday.com/money/2008-02-28-rauschenberg_N.thm, accessed 12 April 2008.

claimed were created by Rauschenberg and that were accompanied by Certificates of Authenticity. The claim alleged that the works sold by Montgomery were not authentic creations of Rauschenberg, thereby infringing upon the artist's right of attribution as protected by VARA. Rauschenberg alleged that Montgomery's actions damaged his image, as well as his personal and professional reputation, and that those actions also had a negative impact on the economic value of legitimate works created by Rauschenberg. The complaint requested that Montgomery and any business associates of Montgomery be temporarily and permanently enjoined from continuing any activities that would in any way confuse or deceive third parties regarding the attribution of works to Rauschenberg. Additionally, any artworks in Montgomery's possession that either bore Rauschenberg's name or had been falsely attributed to Rauschenberg were requested to be delivered to the artist for destruction. Finally, profits that had been gained by Montgomery from the sale of works falsely attributed to Rauschenberg were demanded from Montgomery, and Montgomery was requested by the artist to disclaim the Certificates of Authenticity that accompanied the sales.³¹³ The same day, a complaint for pure bill of discovery was filed.³¹⁴ The purpose of the document was to identify additional possible defendants and possible additional causes of actions against those defendants.³¹⁵

Two months later, on 14 February 2008, Montgomery filed his response. He denied selling works purported to have been created by Rauschenberg or supplying such works with Certificates of Authenticity. He also denied infringing upon Rauschenberg's rights under VARA

³¹³ *Rauschenberg v. Montgomery*, 07-CIV-846, FM 34DNF, 14 February 2008, 1-5.

³¹⁴ A pure bill of discovery is a form which is filed in order to obtain the disclosure of facts known to a defendant, or to obtain information concerning deeds, writings, or other things in the defendant's custody. It is used to aid prosecution or defense. Explanation from Daniel Morman, "The Complaint for a Pure Bill of Discovery: A Living, Breathing Modern Day Dinosaur?" 1 March 2004, http://goliath.ecnext.com/coms2/gi_0199-131418/The-complaint-for-a-pure.html, accessed 23 April 2008.

³¹⁵ *United Press, Inc. v. Montgomery*, 08-CA-000032, "Complaint for Pure Bill of Discovery," 14 February 2008, 1-3.

or in any way having a negative impact on the artist's image, the economic value of his artworks, or his personal and professional reputation. In his affirmative defense, Montgomery claimed that he did not infringe upon Rauschenberg's VARA rights, because the attribution of the artworks was accurate. He also alleged that Rauschenberg was solely responsible for any damages the artist had sustained, since those damages were due to his own reckless, negligent, or culpable conduct, though Montgomery maintained that Rauschenberg in actuality suffered no damages. Montgomery stated that, by throwing studio discards into the trash, Rauschenberg had abandoned his "moral right of attribution."³¹⁶ Unfortunately, with Rauschenberg's recent death on 12 May 2008, the case had to be abandoned, as VARA does not provide any protection for deceased artists.³¹⁷

As this case shows, legal issues regarding VARA will not come to an end anytime soon, and each new case brings up new issues, some of which are of great importance to museums. However, many museums and collecting institutions fail to address these issues in their daily practices. Sharon Erwin, a Philadelphia-area lawyer who represents both commissioning parties and artists on public art contracts, has stated that while many of her clients are very pro-artist in their stance and do not want to limit artists' rights, museums are not among them. It is Erwin's belief that museums do not reflect on VARA because they believe that they, as a matter of course, share the artists' interest to preserve the integrity of the artwork and to track its provenance. Instead, museums tend to focus on their own rights, such as those concerning

³¹⁶ *Rauschenberg* (14 February 2008), 1-3.

³¹⁷ Donn Zaretsky, "Rauschenberg," *The Art Law Blog* 16 May 2008, accessed 16 May 2008, <http://theartlawblog.blogspot.com/2008/05/rauschenberg.html>.

nonexclusive use licenses to allow reproductions of the works in their collections. In addition, many museums deal more with donors and their concerns than directly with the artist.³¹⁸

Because of this lack of concern with VARA, Erwin, when working for museums, often uses boilerplate legal language similar to what would appear in public art commissions, stating that the artist retains all right under VARA. She does use exact language from the Act in the contracts, something she has done since the *Phillips* case.³¹⁹ Based on that case, Erwin has made it a standard practice to negotiate the VARA rights as specific terms within the contract in case the courts finds that VARA does not provide protection to public art.³²⁰ This allows the right to exist contractually, even if it is found to not exist under the Act.³²¹

Erwin is not alone in working with institutions that fail to address VARA. Julia Moore is the Public Art Administrator for Blackburn Architects, Indianapolis, IN. The firm has worked with the National Underground Railroad Freedom Center, the Indianapolis International Airport, the Indianapolis Artsgarden, and various universities, religious organizations, and government agencies.³²² Moore does not include a standard moral rights waiver in Blackburn's contracts, though it is important for all of the firm's clients to be able to alter the buildings at a future point if necessary. Generally, a provision needs to be included to allow the owners to temporarily or permanently remove or relocate artworks from the buildings. According to Moore, it is an industry standard to include a disclaimer that the artist understands that the removal of the artwork may result in its unintentional distortion, destruction, or mutilation. Additionally, Moore discusses the artwork with the artist to determine if it is site-specific, site-integrated, or site-

³¹⁸ Author interview with Sharon M. Erwin, 22 February 2008.

³¹⁹ Erwin (22 February 2008).

³²⁰ Email from Sharon M. Erwin to author, 18 February 2008.

³²¹ Erwin (22 February 2008).

³²² Blackburn Architects website, "Client References," <http://www.blackburnarchitects.com/clients.htm>, accessed 13 February 2008.

independent. For Moore, these terms are strictly defined and separate from each other. Site-specific works can have their site changed, as long as the new site duplicates the conditions of the original site. Works characterized as site-integrated are those where the site is not a part of the artwork, and a new site with similar characteristics are acceptable if the work needs to be relocated. The site-independent works can be moved to any new location. They are not in any way site-specific, even if the work was originally made to be placed at the site.³²³ It is not clear how the courts would interpret these distinctions.

While museums may share many goals and intentions with artists, this does not mean that compliance with VARA should be taken as assured. As has already been shown, VARA is not easily interpreted, and many terms are undefined in the wording of the Act. Instead of assuming that museums will comply with VARA based on adherence to a code of ethics, *a code which generally does not address moral rights*, museums should directly address the Act's requirements in all its dealings with artists and artworks by living artists.

There are resources available to museums which could provide some guidance in addressing moral rights in general and VARA in particular. AAM has published a "Sample VARA Waiver Form (Including Copyright Transfer Provision)," which is available online. However, this document requires the artist to

"waive voluntarily all rights to attribution and integrity with respect to the Work and any and all claims as may arise under the Visual Artists Rights Act of 1990... or any other local, state foreign or international law, as currently drafted or as may be hereafter amended, that conveys the same or similar rights... with respect to the Work, its display, removal from display, exhibition, installation, conservation, storage, study, alteration and any other activities conducted by the Museum, its officers, employees, agents, contractors, licensees, successors or assigns."³²⁴

³²³ Author interview with Julia Moore, 15 February 2008.

³²⁴ American Association of Museums Information Center – Rights and Reproductions, "Sample VARA Waiver Form (Including Copyright Transfer Provision)," <http://www.aam->

What is particularly disappointing about this document is that it explicitly looks for artists to relinquish all moral rights to their work. Instead of supporting the artist, the document looks to force the artist into a position identical to where they were before VARA's adoption. AAM seems to be more concerned with the property rights of owners than with the moral rights of artists, especially since it has made no document, such as a sample contract, that addresses how to negotiate VARA protections instead of fully waiving them.

The Registrars' Committee of the American Association of Museums (RC-AAM) takes a similar approach. In Section 13 of their "Agreement for Commissioned Installation/Artwork" it is stated that

"Pursuant to the Visual Artists Rights Act of 1990, the Artist hereby specifically waives any and all rights that may be granted under such an act and understands that the Installation/Artwork to be produced under this Agreement may, at [Name of Museum]'s discretion, be destroyed after the Exhibition unless Artist has received or can remove the Installation/Artwork from the premises by _____(month, date, year)."³²⁵

Again, AAM (or, in this case, a professional committee of AAM) is focusing on property and economic rights above moral rights. Additionally, the AAMD and the College Art Association (CAA) fail to provide any resources or sample documents addressing moral rights. (These organizations are not alone, as ICOM also fails to address these rights in its Code of Ethics.)

AAM's refusal to address moral rights may be one reason why museums have failed to take any action towards them in their operations. On its "Standards and Best Practices" site,

us.org/museumresources/ic/cs/eth_legal/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=20515, accessed 14 March 2008, 1.

³²⁵ Registrars' Committee of the American Association of Museums website, News section, "Agreement for Commissioned Installation/Artwork", <http://www.panix.com/~squigle/contract.html>, accessed 11 February 2008, 4.

AAM makes no mention of moral rights.³²⁶ Similarly, the Code of Ethics for Museums promulgated by the organization fails to mention these rights. Among the variety of ethical guidelines published by AAM, which addresses such diverse issues as donor support and Nazi-era provenance, moral rights of artists and museums' interaction with VARA receives no mention.³²⁷ Perhaps if AAM would take a more reasonable and public stance regarding VARA, museums would realize that the Act needs to be addressed.

VARA affects both commissioned works and non-commissioned works, making its relevancy high for any museum that collects art created by living artists as well as any non-collecting museum or *Kunsthalle* that commissions site-specific works. Moreover, as *Carter* has demonstrated, a museum can be held liable for violating moral rights of an artist, even if the museum is not the original entity to purchase or commission the artwork. Additionally, *Pavia* and *Martin* both make obvious that those works do not need to have been created after 1990. VARA can be retroactively applied in a limited number of cases, and museums need to be aware of what works in their collection may be protected despite a pre-1990 creation date.

Furthermore, questions about VARA exist which have not yet been tried in the courts. For instance, does the retroactivity of VARA apply if a work is donated to a museum as a partial gift, with the donation beginning prior to 1990 and concluded afterwards? In this case, the title would not fully pass to the museum until the final portion of the gift is donated, but the museum would be a joint-owner before the VARA enactment date. Questions like this have not been answered, making it necessary for museums to pay more attention to VARA. Additionally, while waivers of moral rights seem to be highly encouraged by AAM, the validity of such

³²⁶ American Association of Museums website, "About Museums: Standards and Best Practices," <http://www.aam-us.org/aboutmuseums/standards/stbp.cfm#bp>, accessed 14 April 2008.

³²⁷ American Association of Museums website, "Museum Resources: Museum Ethics," <http://www.aam-us.org/museumresources/ethics/index.cfm>, accessed 14 April 2008.

waivers is not entirely clear. In its “Waiver of Moral Rights in Visual Artworks: Executive Summary,” the United States Copyright Office stated that due to the youth of the Act, it is difficult to predict the impact of these waivers.³²⁸

In stark contrast to AAM’s and RC-AAM’s approach is the American for the Arts “Annotated Model Public Art Commission Agreement.” While museums, or at least AAM, seem to want artists to waive every protection they have under VARA, Americans for the Arts explicitly states that artists are to retain all rights. Specifically, the document states that

“(a.) The Artist retains all rights under state and federal laws including §106A of the Copyright Act of 1976. (b.) The Agency agrees that it will not intentionally alter, modify, change, destroy or damage the Artwork without first obtaining permission from the Artist. (c.) If any alteration or damage to the Artwork occurs, the Artist shall have the right to disclaim authorship of the Artwork in addition to any remedies the Artist may have in law or equity under this contract...”³²⁹

The model contract addresses VARA and provides protection of those moral rights derived from the Act, namely the rights of integrity and attribution. This example stands in sharp contrast to the AAM approach, suggesting a deep gulf in the communication between institutions and artists.

Based on the American case history and the recent problems faced by Mass MoCA, it is clear that museums need to cease ignoring the problems created by VARA and take some action to create an industry-accepted approach to moral rights. AAM must spearhead this by bringing moral rights to the forefront of the discourse among museum professionals. An exploratory meeting, with representatives from the museum community, artists, and legal counsel

³²⁸ United States Copyright Office, “Waiver of Moral Rights in Visual Artworks: Executive Summary,” 24 October 1996, <http://www.copyright.gov/reports/exsum.html>, accessed 11 April 2008.

³²⁹ Americans for the Arts, “Annotated Model Public Art Commission Agreement,” http://www.americansforthearts.org/pdf/networks/pan/annotated_contract.pdf, accessed 3 March 2008, 18.

specializing in museum and art issues, should be convened to produce an ethical guideline concerning moral rights and VARA. Sample documents and contracts, not just waiver forms, should be made available through AAM publications and the organization's website. A dialogue addressing the importance of these rights and museums' responsibility needs to be started, encouraging museums to understand that moral rights need not be a hurdle but rather a means to further their own missions. AAM defines a museum as an organization that provides a "unique contribution to the public by collecting, preserving, and interpreting the things of this world."³³⁰ Requiring artists to waive their federally-protected rights to integrity and attribution does not further this definition. Instead, forcing these waivers on artists suggests that museums do not hold the integrity of artworks, which includes preservation, in the highest regard. Additionally, by trying to deny artists their right to attribution, museums suggest that they are the ultimate gatekeepers to culture and history, dictating who will be credited with an artwork's creation, not the individual or group who actually created the artwork.

American museums have, as a whole, failed to take the necessary steps to address artists' moral rights protection. The organizations which represent museums have taken the stance of requiring artists to waive their rights of integrity and attribution, a position which, while legally acceptable, is ethically questionable. As institutions which base their missions on preservation, interpretation, documentation, and presentation, museums need to recognize that upholding these moral rights is a goal which is firmly in alignment with their stated missions.

To address this situation, a four step process is recommended to improve American museums' dialogue with artists regarding moral rights. First, the AAM should form a task force

³³⁰ American Association of Museums website, "About Museums: What is a Museum," <http://www.aam-us.org/aboutmuseums/whatis.cfm>, accessed 4 April 2008.

to examine the situation of moral rights in America in general and the application of VARA in particular. This task force should consist of a variety of museum professionals (including directors, exhibition developers, registrars, collection managers, curators, conservators, and other relevant representatives), legal counsel familiar with the specific issues concerning museums, collectors, and representatives of the artistic communities, including visual artists. This task force should work together to compile a list of recommendations to present to the AAM member institutions for review.

Second, these recommendations for action need to be presented to the AAM members and board for review, comment, and revision. A finalized set of recommendations on how institutions should address moral rights and VARA compliance should be published and made available to members on AAM's website.

Based on these recommendations, either the original task force or a new group should take the third step of writing a set of ethical guidelines to be included on the AAM website. Like other ethical guidelines published on the organization's website, this document should provide insight into why moral rights are a concern for institutions, why a standard waiver is not the best practice for museums, and what the AAM's official stance is regarding the ethics of recognizing and upholding moral rights.

Finally, the fourth step would be the development and publication of a series of standard sample documents to be made available to institutions. One important document that needs to be developed is a sample section for inclusion in an institution's collections management policy. The collections management policy dictates a museum's standard policies and procedures concerning the permanent collection, including what types of objects are accessioned and the policy concerning acquisition and accessioning, standards for environmental and security

procedures, access to collections, and other collections-based concerns. This text should provide a sample policy outlining who should address VARA concerns when a new object is being considered for acquisition, what types of negotiations are acceptable, and who approves the final agreement.

Additionally, sample documents and contracts need to be prepared that address moral rights for acquisition documents, such as purchasing agreements, donor contracts, and commissioning forms. Much as museums ascertain copyright status of a work at the time of acquisition, they must also establish its moral rights status. If the individual or corporation that is transferring title to the museum has already addressed the moral rights in the works, a copy needs to be provided to the institution. The museum needs to be aware of whatever agreement exists between the previous owner and the artist, and if necessary, it may have to negotiate its own agreement with the artist.

All of these generated forms, examples of sample text, and documents need to be published by AAM on its website in order to ensure that they are promulgated. Additionally, AAM's Accreditation Commission should consider if a museum's moral rights policy needs to be considered in accreditation review. Such inclusion in the accreditation process would draw even greater attention to the issue in the American museum community and make a strong case for the AAM's belief in the professional and ethical importance of recognizing and upholding artists' rights.

Besides the AAM, state and regional museum organizations which represent states that have their own moral rights legislation should consider taking similar steps. For example, the California Association of Museums, the Museum Association of New York, and the Mid-Atlantic Association of Museums, which all represent areas that have state-level legislation, need

to address the issues of moral rights. Despite the passage of VARA, these state laws are still applicable to individuals and corporations working in these regions. While the federal statute overrides the state legislation in most cases, the state laws are the ruling guidelines in cases where the state law provides greater protection than VARA. This means that in states such as California, Connecticut, and Pennsylvania, where the state law provides protection for the lifetime of the artist plus fifty years, VARA does not impose the lifetime protection found in Section (d)(1) of the Act.

The steps outlined here will serve to elevate the status of moral rights in the eyes of American museums and encourage these institutions to look beyond simple waiver forms. Museums need to meet the challenges set forth by VARA with the same high-minded ethical standards with which they meet other issues concerning the collecting of artworks. The AAM, as the main representative organization of museums in the United States, needs to spearhead this initiative and encourage museums to recognize the opportunities inherent in VARA. By addressing concerns of moral rights in their collection policies, museums have an opportunity for greater dialogue with living artists and for increasing their understanding of the motivations and concerns of these artists. For museums to continue to ignore moral rights is inappropriate and ethically questionable. In choosing to follow the recommendations outlined here, American museums can show that they are reaching above the minimal legal requirements set by the Act and aiming for a higher level of ethical standards.

APPENDIX: VISUAL ARTISTS RIGHTS ACT AND RELATED LEGISLATION**U.S. CODE TITLE 17 > CHAPTER 1 > § 106A.****RIGHTS OF CERTAIN AUTHORS TO ATTRIBUTION AND INTEGRITY.**

(a) Rights of Attribution and Integrity.— Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—

(1) shall have the right—

(A) to claim authorship of that work, and

(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and

(3) subject to the limitations set forth in section 113 (d), shall have the right—

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

(b) Scope and Exercise of Rights.— Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner. The authors of a joint work of visual art are coowners of the rights conferred by subsection (a) in that work.

(c) Exceptions.—

(1) The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A).

(2) The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.

(3) The rights described in paragraphs (1) and (2) of subsection (a) shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of “work of visual art” in section 101, and any such reproduction, depiction, portrayal, or other use of a work is not a destruction, distortion, mutilation, or other modification described in paragraph (3) of subsection (a).

(d) Duration of Rights.—

(1) With respect to works of visual art created on or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, the rights conferred by subsection (a) shall endure for a term consisting of the life of the author.

(2) With respect to works of visual art created before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, but title to which has not, as of such effective date, been transferred from the author, the rights conferred by subsection (a) shall be coextensive with, and shall expire at the same time as, the rights conferred by section 106.

(3) In the case of a joint work prepared by two or more authors, the rights conferred by subsection (a) shall endure for a term consisting of the life of the last surviving author.

(4) All terms of the rights conferred by subsection (a) run to the end of the calendar year in which they would otherwise expire.

(e) Transfer and Waiver.—

(1) The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author. Such instrument shall specifically identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified. In the case of a joint work prepared by two or more authors, a waiver of rights under this paragraph made by one such author waives such rights for all such authors.

(2) Ownership of the rights conferred by subsection (a) with respect to a work of visual art is distinct from ownership of any copy of that work, or of a copyright or any exclusive right under a copyright in that work. Transfer of ownership of any copy of a work of visual art, or of a copyright or any exclusive right under a copyright, shall not constitute a waiver of the rights conferred by subsection (a). Except as may otherwise be agreed by the author in a written instrument signed by the author, a waiver of the rights conferred by subsection (a) with respect to a work of visual art shall not constitute a transfer of ownership of any copy of that work, or of ownership of a copyright or of any exclusive right under a copyright in that work.

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by section 602 of Pub. L. 101–650 effective 6 months after Dec. 1, 1990, see section 610 of Pub. L. 101–650, set out as an Effective Date note under section 106A of this title. Section 706 of title VII of Pub. L. 101–650 provided that: “The amendments made by this title [enacting section 120 of this title and amending this section and sections 102, 106, and 301 of this title], apply to—

(1) any architectural work created on or after the date of the enactment of this Act [Dec. 1, 1990]; and

(2) any architectural work that, on the date of the enactment of this Act, is unconstructed and embodied in unpublished plans or drawings, except that protection for such architectural work under title 17, United States Code, by virtue of the amendments made by this title, shall terminate on December 31, 2002, unless the work is constructed by that date.

U.S. Code Title 17 > Chapter 1 > § 101. Definitions.

A “work of visual art” is—

- (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
- (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include—

- (A)
 - (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 merchandising 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.

U.S. CODE TITLE 17 > CHAPTER 1 > § 113.

SCOPE OF EXCLUSIVE RIGHTS IN PICTORIAL, GRAPHIC, AND SCULPTURAL WORKS.

- (a) Subject to the provisions of subsections (b) and (c) of this section, the exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise.
- (b) This title does not afford, to the owner of copyright in a work that portrays a useful article as such, any greater or lesser rights with respect to the making, distribution, or display of the useful article so portrayed than those afforded to such works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1977, as held applicable and construed by a court in an action brought under this title.
- (c) In the case of a work lawfully reproduced in useful articles that have been offered for sale or other distribution to the public, copyright does not include any right to prevent the making, distribution, or display of pictures or photographs of such articles in connection with advertisements or commentaries related to the distribution or display of such articles, or in connection with news reports.

(d)

(1) In a case in which—

(A) a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106A (a)(3), and

(B) the author consented to the installation of the work in the building either before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, or in a written instrument executed on or after such effective date that is signed by the owner of the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal, then the rights conferred by paragraphs (2) and (3) of section 106A (a) shall not apply.

(2) If the owner of a building wishes to remove a work of visual art which is a part of such building and which can be removed from the building without the destruction, distortion, mutilation, or other modification of the work as described in section 106A (a)(3), the author's rights under paragraphs (2) and (3) of section 106A (a) shall apply unless—

(A) the owner has made a diligent, good faith attempt without success to notify the author of the owner's intended action affecting the work of visual art, or

(B) the owner did provide such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal.

For purposes of subparagraph (A), an owner shall be presumed to have made a diligent, good faith attempt to send notice if the owner sent such notice by registered mail to the author at the most recent address of the author that was recorded with the Register of Copyrights pursuant to paragraph (3). If the work is removed at the expense of the author, title to that copy of the work shall be deemed to be in the author.

(3) The Register of Copyrights shall establish a system of records whereby any author of a work of visual art that has been incorporated in or made part of a building, may record his or her identity and address with the Copyright Office. The Register shall also establish procedures under which any such author may update the information so recorded, and procedures under which owners of buildings may record with the Copyright Office evidence of their efforts to comply with this subsection.

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