

MORAL RIGHTS UNDER FEDERAL LAW

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In 1959, sculptor Amar Nath Sehgal was commissioned to design a mural that would adorn the walls of a central arch in a building that served as a venue for important government functions. The mural became a landmark of cultural life in the city and attracted dignitaries and art connoisseurs from all over the world. Then, after nearly twenty years, the mural was ripped from the wall during renovation of the building. Parts of the 40 foot by 140 foot mural were destroyed and the rest was put into storage. After years of petitions to the government, Mr. Sehgal finally initiated a lawsuit for violation of his moral rights, claiming that “the dismemberment of the homogenous blend of the pieces of each tile in the mosaic constituted an act of mutilation”; the removal was “prejudicial to his honor and reputation as an artist, because, by reducing the mural to junk, it dealt a body blow to the esteem and celebrity bestowed on the work at its inception”; and “the obliteration of his name on the work violated his right to claim authorship.¹” The court ruled in his favor, ordering return of the remnants of the mural to the artist and awarding damages that were equivalent to approximately \$12,000. Still, the legal battle continued, but eventually, Mr. Sehgal waived the claim for damages in exchange for return of what was left of his mural.

Mr. Sehgal’s battle was fought and won in India, one of the many countries that has long recognized and enforced artists’ moral rights. Had Mr. Sehgal’s mural been similarly destroyed in the United States at that time, he likely would have had little recourse because the United States has formally recognized moral rights only since 1990, when the Visual Artists Rights Act (VARA) was enacted. Additionally, compared to moral rights in India, Europe, and elsewhere, moral rights in the United States are much weaker, in large part because of the narrow scope of the VARA, codified at 17 U.S.C. § 106A, the number of exceptions in the VARA, and the ease with which the rights can be waived. For these reasons, and because few are even aware that moral rights are recognized here, few artists in this country have been successful in moral-rights violation actions. Even so, when the circumstances are right, the VARA has the potential to be a powerful tool to protect an artist’s interest, particularly when copyright law offers little relief.

THE VARA

The VARA ensures certain artists the rights of attribution and integrity. More specifically, the VARA gives authors of works of “visual art” the right to claim authorship of his or her work and to prevent others from naming him or her as the author of work that has been distorted, mutilated, or otherwise modified if such modification would be prejudicial to the artist’s honor or reputation. These make up the rights of attribution. The VARA also gives authors of visual works the right to “prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation” and

“to prevent any destruction of a work of recognized stature”² These constitute the rights of integrity.

THE VARA’S ADVANTAGES

Certain aspects of the VARA make it a very attractive and potentially-strong tool for protecting an artist’s interest in a work of visual art. First, the rights provided in the VARA survive with the author artist even after the work of visual art has been sold and even after the author has transferred the copyright in that work to another. This is because the rights in the VARA may not be transferred, and ownership of the moral rights are distinct from ownership of any copy of the work, of the copyright in the work, or of any exclusive right under a copyright in that work.³ Second, to bring an action for violation of an artist’s rights under the VARA, the copyright of the work in question need not be registered.⁴ Thus, while a copyright holder must wait to bring an action for copyright infringement only after the copyright has been registered, the artist may immediately initiate a claim for a violation of the VARA.⁵ Third, statutory damages may be recovered for violations of the VARA. In cases of copyright infringement, statutory damages are recoverable only if the copyright for the work in question was registered within three months of the first publication of the work or prior to the infringement.⁶ Contrarily, because the copyright of the work need not be registered to assert rights under the VARA, statutory damages are available even if the copyright of the work has never been registered or even if the copyright was registered well after publication or after the violation occurred. Accordingly, should an artist find him or herself in a situation in which his or her work has been mutilated or distorted during the creation of a derivative work by another, if the copyright of the work was not registered prior to the copyright infringement (i.e., the creation of the derivative work), or if proving ownership of the copyright would be difficult, the artist may be better off bringing an action for violation of his or her rights under the VARA, rather than just alleging copyright infringement.

THE VARA’S SHORTCOMINGS

Despite the VARA’s potential to protect artist’s interests when copyright law would not, the scope of the VARA is so narrow, its exceptions so many, and its protections so easily waived that few artists have found relief therein.

SHORTCOMING # 1—LIMITED TO “WORKS OF VISUAL ART”

As a first example of the narrow scope of the VARA, it applies only to the authors of a “work of visual art.”⁷ A “work of visual art” may be, basically, a painting, a drawing, a print, a sculpture, or a photograph (produced for exhibition purposes only) where the art exists in a single copy or in a limited number of copies that are signed and numbered by the author.⁸ The list of works specifically excluded from the definition of “work of visual art” is long: posters; maps; globes; charts; technical drawings;

diagrams; models; applied art; motion pictures or other audiovisual work; books; magazines; newspapers; periodicals; data bases; electronic information services; electronic publications; or similar publications; any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container; any work not subject to copyright protection; and any work made for hire.⁹ Thus, essentially only fine arts artists who have not been commissioned to create the work in question are clearly within the scope of the VARA (with still other exceptions discussed below). Artists who use unusual mediums or who have been commissioned to create their works are less surely protected. Commissioned artists, in particular, are at risk of having their works be considered “works made for hire”¹⁰ and therefore outside of the protection of the VARA.¹¹

SHORTCOMING # 2—AMBIGUOUS TERMS WITH UNCLEAR STANDARDS OF PROOF

Moreover, to exercise the rights under the VARA so as to prevent intentional distortion, mutilation, or modification of a work, or to prevent use of his or her name as the author of a work of art that has been distorted, mutilated, or otherwise modified, the artist must prove that the distortion, mutilation, or modification “would be prejudicial to his or her honor or reputation.”¹² Similarly, to prevent destruction, the artist must prove that the work is “a work of recognized stature.” None of “prejudice,” “honor,” “reputation,” or “recognized stature”¹³ are defined in the VARA. Further, there is little case law to provide guidance on the meaning of these terms. It seems to boil down to a requirement that the artist must show that art experts, the art community, or society in general would view the work as possessing stature.¹⁴ Finding evidence of this can be quite difficult if the work was significantly mutilated or completely destroyed before it could be reviewed by an art expert.¹⁵

SHORTCOMING # 3—TOO MANY EXCEPTIONS

In addition to its limited scope and vague standards, there are several exceptions to the VARA¹⁶. Included in these is the exception of Section 106A(c)(2) that “[t]he modification of a work of visual art which is the results of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification . . . unless the modification is caused by gross negligence.¹⁷” This provision was recently held by the United States Court of Appeals for the First Circuit to mean that the VARA does not apply to site-specific art, i.e., art where the location of the work is an integral element of the work.¹⁸ The First Circuit reasoned that because Section 106A(c)(2) states that placement is not a destruction, distortion, mutilation, or other modification, the VARA necessarily permits work to be relocated. Because site-specific art is at least partially destroyed by being moved, the VARA cannot protect site-specific art while permitting its relocation. Considering that the VARA has apparently been utilized most by artists whose works were originally designed for installation in public locations, the First Circuit’s decision hits a heavy blow to the protections of the VARA. If this holding is followed, it will, in this author’s opinion, effectively eliminate the VARA’s protections for a large percentage of those who would otherwise

benefit most from it, i.e., the public-art artists who integrate the intended setting of their work in the art itself.

SHORTCOMING # 4—EASY WAIVER

Finally, the rights protected by the VARA are easily lost. Though in Europe and in India, artists’ moral rights are inalienable, in the United States, under the VARA, an artist’s rights are waived if the author expressly agrees, in writing, to the waiver.¹⁹ The waiver provision in the United States is apparently unique. The VARA was enacted in accordance with the requirements of the Berne Convention for the Protection of Literary and Artistic Works, to which the United States is a member. The Berne Convention is silent on moral rights waivers. Even so, when the United States codified the recognition of moral rights so as to comply with the Berne Convention, it included a waiver provision in the VARA. Because of the concern that artists could be pressured into waiving their moral rights due to lack of bargaining power, in 1996, the Copyright Office reported on a survey conducted to assess for Congress the impact of the waiver provisions of the VARA.²⁰ Nearly forty percent of respondents reported that waiver clauses were parts of contracts for commissioned works.²¹ Such moral-rights waiver requests are continuing to be made, particularly with regard to commissioned works, and with increasing frequency.²² Waiver is further made easier in the case of a work having two more authors. In such cases, the moral rights are co-owned by the authors, and waiver of the moral rights by one author waives the rights for the other authors.²³

CONCLUSION

All things considered, the VARA is a potentially-great source of protection of an artist’s interests when the circumstances are right, particularly when the artist has transferred his or her copyright rights or did not register the copyright within three months of publication or before infringement. Thus, in a hypothetical circumstance in which a piece of artwork (that was not a commissioned work raising concerns of its being a “work for hire,” that is not a site-specific installation, and that has been published in magazines, displayed in museums, and acclaimed by the art critic world as being of “stature”) has been mutilated or destroyed (at least to the point that the original artist has been rebuked and publicly humiliated), provided that the artist is still alive, was not pressured into signing a moral-rights waiver at the time the artwork was sold or at any other time (and did not have a co-author that was so pressured), and is in the minority of artists who have the means of bringing a federal civil law suit,²⁴ the VARA is a handy sword.

ABOUT THE AUTHOR

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ENDNOTES

¹ Binny Kalra, *Copyright in the Courts: How Moral Rights Won the Battle of the Mural*, WIPO MAGAZINE, Apr. 2007, available at http://www.wipo.int/wipo_magazine/en/2007/02/article_0001.html (last visited June 30, 2008).

² 17 U.S.C. § 106A(a)(3)

³ 17 U.S.C. § 106A(e).

⁴ “Except for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.” 17 U.S.C. § 411(a) (emphasis added).

⁵ Pursuant to 17 U.S.C. § 504(c), a copyright owner may elect, at any time before final judgment, to recover statutory damages rather than actual damages and profits. 17 U.S.C. § 504(c)(1). When the copyright owner can prove that the infringement was willful, the court may increase the award of statutory damages to \$150,000. 17 U.S.C. § 504(c)(2) Because actual damages and profits are often difficult, if not impossible, to prove, seeking statutory damages is usually preferred. (It should be noted that even though rights under the VARA are distinct from the copyright rights, with regard to Section 504, the definition of “copyright owner” includes an artist under the VARA Section 106A(a). 17 U.S.C. § 501(a) (“For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a).”).

⁶ 17 U.S.C. § 412.

⁷ 17 U.S.C. § 106A(a).

⁸ 17 U.S.C. § 101.

⁹ *Id.*

¹⁰ “Works made for hire” fall within those works that are excepted from the normal copyright rule that the author of the work is the owner of the copyright. Determining whether or not a work is a “work made for hire” under the copyright laws depends in large part on whether the artist was “an employee” or “an independent contractor” of the person who hired the artist or who ordered the work. This is a topic for a separate article.

¹¹ See, e.g., *Carter v. Helmsley-Spear Inc.*, 71 F.3d 77 (2d Cir. 1995). In *Carter*, three sculptors were commissioned to create a large art installation for a Queens warehouse. The landlord demanded that the artists vacate and indicated that he would remove the work in progress. The artists sued under VARA and won an injunction against the destruction in the district court. On appeal, however, the Second Circuit Court of Appeals concluded that the sculpture was a “work made for hire” and therefore was outside the scope of the VARA.

¹² 17 U.S.C. § 106A(a)(2),(3)(A).

¹³ 17 U.S.C. § 106A(a).

¹⁴ David M. Spatt, *Life after the Federal Visual Artists Rights Act*, available at <http://www.artslaw.org/VARA.htm> (last visited June 30, 2008).

¹⁵ See, e.g., *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999). In *Martin*, the work of a reputable artist had been completely destroyed. In determining whether the work was a “work of stature,” the Seventh Circuit cited *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994), *aff’d in part, vacated in part, rev’d in part*, 71 F.3d 77 (2d Cir. 1995). In particular, the Seventh Circuit noted the district court’s statement in *Carter* that to make the showing of “stature,” “plaintiffs generally, but not inevitably, will need to call expert witnesses to testify before the trier of fact.” *Martin*, 192 F.3d at 612 (citing *Carter*, 861 F.Supp. at 325). Though the artist in *Martin* was ultimately successful in receiving costs, attorney’s fees, and apparently statutory damages, the artist’s case was made all the more

difficult because the sculpture at issue “was destroyed by the City without the opportunity for experts to appraise the sculpture in place.” *Martin*, 192 F.3d at 612.

¹⁶ See 17 U.S.C. § 106A(c).

¹⁷ 17 U.S.C. § 106A(c)(2).

¹⁸ *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128 (1st Cir. 2006).

¹⁹ 17 U.S.C. § 106A(e).

²⁰ *Waiver of Moral Rights in Visual Artworks*, Copyright Office (Oct. 24, 1996), available at <http://www.copyright.gov/reports/exsum.html> (last visited June 30, 2008).

²¹ *Id.*

²² Patricia Failing, *Artists Moral Rights in the United States before VARA/1990: An Introduction*, Session Paper for a Panel Discussion of the Visual Artists Rights Act (VARA) for The Committee on Intellectual Property of the College of Art Association (Feb. 2002), available at <http://www.studiolo.org/CIP/VARA/Failing/Failing.htm> (last visited June 30, 2008).

²³ 17 U.S.C. § 106A(e).

²⁴ According to the Copyright Office’s survey in 1996, most artists who responded grossed less than \$10,000 annually from their artwork. *Waiver of Moral Rights in Visual Artworks*, Copyright Office (Oct. 24, 1996), available at <http://www.copyright.gov/reports/exsum.html>