

ARTIST'S GUIDE TO THE

visual artists rights act

UNDERSTANDING YOUR
(LIMITED) MORAL RIGHTS

VOLUNTEER
LAWYERS AND
ACCOUNTANTS
FOR THE
ARTS
ST. LOUIS

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VLAA also offers a wide variety of educational programs in arts law and business including seminars, speakers, a resource library, and publications.

Arts Resolution Services, a national collaboration among several volunteer lawyers for the arts organizations, provides mediation services and workshops in negotiation skills.

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Your (Limited) Moral Rights

Is a violated Calder still a Calder? In 1958, Alexander Calder's award-winning sculpture "Pittsburgh" underwent some unexpected changes after it was displayed in the rotunda of the Greater Pittsburgh International Airport. The free-moving, graceful mobile was motorized and re-weighted without Calder's knowledge, and its original black and white colors were repainted in pea green and gold.

So is a violated Calder still a Calder? Most would agree that it is not. Art has the right to be left alone, and the alteration or destruction of a work without the artist's consent insults the artist and degrades our culture. France, Germany, Italy, most other European nations, along with some Latin American nations, have long recognized the concept of the *droit moral*, a philosophy that creates rights for an artist, based on the belief that the integrity of an original work should be protected and preserved.

Do American artists enjoy the same protection? What rights does an American visual artist have after a work is sold, and how is the artist's creation protected from future alteration or destruction? The Visual Artists Rights Act of 1990, known as VARA, addresses these issues by recognizing and protecting the moral rights of an artist. Moral rights are based on the assumption that an artist's honor and livelihood are dependant upon the presentation of his work as created, and that alteration can damage the artist's reputation. Moral rights legislation acknowledges a continuing relationship between the artist and his work that exists even when the artist does not own the actual work or its copyright.

VARA is a part of United States copyright law, and it preserves the artist's moral rights by protecting certain works of art from being altered or destroyed without the artist's consent. VARA grants two primary rights:

- The right of attribution permits the artist to claim or deny authorship of the work, which allows the artist to dissociate himself with any undesirable changes to the original work. Therefore, artists can prevent the use of their name as the creator of a work in the event of distortion, mutilation, or other modification of the work that would be prejudicial to their honor or reputation.
- The right of integrity enables artists to prevent the intentional distortion, mutilation or other modification of a work that is harmful to their honor or reputation. Where the work is of a "recognized stature," the right of integrity further includes the right to prevent any intentional or grossly negligent destruction of the work. VARA leaves the definition of "recognized stature" wide open, and courts must determine what this term means on a case-by-case basis.

First of all, VARA covers only a limited, fine art category of visual artworks: paintings, sculptures, drawings, prints, and still photographs produced for exhibition. Within this group, only single copies or signed and numbered limited editions of 200 or less are actually protected.

VARA does not apply to any of the following works: posters, maps, globes or charts, technical drawings, diagrams, models, applied art, motion pictures, books and other publications, electronic publications, merchandising items or advertising, promotional, descriptive, covering, packaging material or containers. Also, VARA does not cover any work not subject to basic copyright protection.

Even if a work qualifies for VARA protection, there are several exceptions to coverage. For example, natural changes resulting from aging, decay, or the inherent quality of the materials are not covered under VARA. Similarly, modification resulting from conservation or public presentation involving lighting and placement is not covered, unless the modification is "grossly negligent." For example, while some natural fading is unavoidable for textiles, excessive fading caused by overexposure to direct sunlight could be considered "grossly negligent" behavior, and this type of action could violate VARA.

In addition, the right of attribution does not apply to a reproduction, depiction, or portrayal of a work. Protection is triggered only in the event of a distortion, mutilation, or modification that is prejudicial to one's honor or reputation.

If the work is part of a building, VARA rights do not apply if the art was placed in the building before December 1990, or if both the artist and the building owner entered into a written agreement on or after December 1990, stating that the work may be subject to damage by reason of removal from the building. If the building owner wants to remove a work, VARA rights will not apply if (1) the building owner has made a diligent effort to notify the artist of the intent to remove the work, or (2) the artist received the notice, and failed to remove the work or pay for removal within 90 days after receiving the notice.

Several additional points are critical to understanding the basics of VARA protection:

- Moral rights can be waived (signed away) if the artist consents in writing.
- If the work is created by more than one artist, one creator's waiver applies to the entire group of artists.
- Artists who contract to create a work for hire will not enjoy VARA protection for the work. A work made for hire is a work created by an employee within the scope of employment or commissioned under contract. With a work for hire, the copyright owner is the entity that pays for it, not the person who creates it.
- The artist's rights under VARA persist during the artist's life for works created on or after June 1991. For works created before June 1991, the rights persist for the duration of the copyright, which may be as long as the artist's life plus 70 years.

In order to fully protect themselves, parties to a transaction involving moral rights, especially those with waiver provisions, should always seek legal advice when contracting for the commission or sale of a work.

An effective waiver must be very specific: it must specify the identity of the work and the uses to which the waiver applies. This can help strike a balance between the interests of artists and clients, by allowing negotiations to determine specific uses for the waiver. At a minimum, the waiver prevents the artist from being completely surprised by a modification of the work, because the contract will specify the circumstances under which moral rights are waived.

Artists can attempt to contract for the protection of their work by negotiating agreements that encourage the preservation of the original creation. Such contracts may not be popular with owners and buyers, and negotiating this type of protection may not be possible for the artist, who may not enjoy significant bargaining power. Each artist will have to evaluate the facts and circumstances of each agreement in order to determine whether or not the artist will enjoy moral rights protection.

State Moral Rights Laws

Several states have adopted moral rights statutes that may work in conjunction with VARA. Many state laws will be preempted by VARA, so an artist interested in state law protection must seek legal advice and analyze the specifics of the state law in order to fully understand all of the rules and know when preemption applies. The following summary of state moral rights laws provides a brief, general overview of the different statutes that have been enacted by state legislatures.

California Art Preservation Act (1979): prohibits intentional “defacement, mutilation, alteration, or destruction” of fine art and empowers the artist to disclaim authorship for “just and valid reason.”

The full text of the California Art Preservation Act can be found at:
www.sfartscommission.org/pubart/about_us/policies_guidelines/capa.htm

New York Artists Authorship Rights Act (1983): The artist may claim authorship or “for just and valid reason” disclaim authorship. “Just and valid” reasons include unauthorized alteration, defacement, mutilation, or other modification when damage to the artist’s reputation has resulted or is reasonably likely to result. Unlike California, New York grants a right of integrity that merely prevents public display of a work of fine art that is “altered, defaced, mutilated, or modified” if the artwork is displayed as being the work of the artist, and damage to the artist’s reputation is reasonably likely to result. The main policy concern is the protection of the artist’s reputation. Therefore, it applies only to works on display and not to acts occurring in private. The act requires that damage to the artist’s reputation must be reasonably likely to result from the display. New York law does not forbid the total destruction of a work.

The full text of the New York Artists Authorship Rights Act can be found at:
assembly.state.ny.us/leg/?cl=7&a=16

Massachusetts Moral Rights Statute (1984): Substantially similar to California.

The full text of the law can be found at:
www.mass.gov/legis/laws/mgl/231-85s.htm

Maine Moral Rights Statute (1985): Based on New York’s law, and substantially similar to the New York statute.

The full text of the law can be found at:
janus.state.me.us/legis/statutes/27/title27sec303.html

Louisiana’s Artists Authorship Rights Act (1986): The artist retains the right to claim authorship of his or her work, and to disclaim authorship for just and valid reason. Louisiana’s right of integrity prohibits the unauthorized, knowing, public display of a work of fine art or its reproduction in an “altered, defaced, mutilated, or modified form” or the unauthorized public display of a work attributed to the artist under circumstances reasonably likely to result in damage to the artist’s reputation.

The full text of the law can be found at:
www.legis.state.la.us/lss/lss.asp?doc=104236

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New Jersey Artist's Rights Act (1986): Substantially similar to New York and Maine. The full text of the statute can be located at: lis.njleg.state.nj.us, search for section 2A:24A-1

Pennsylvania Fine Arts Preservation Act (1986): Based on California legislation, but applies only to works that are displayed in places accessible to the public. The full text of the statute can be found at: www2.legis.state.pa.us/WU01/LI/BI/BT/1985/0/HB0490P3927.pdf

New Mexico's Act Relating to Fine Art in Public Buildings (1987): Follows California Act, but limits certain coverage to art in "public buildings." The full text of the statute can be found at: www.conwaygreene.com/nmsu/1pext.dll?f=templates&fn=main-hit.h.htm&2.0, search fine art in public buildings

Rhode Island's Artists Rights Act (1987): Follows New York, Maine, and New Jersey statutes – however, it does not include the New York requirement that damage to the artist's reputation must be reasonably likely to result from a display. The full text of the statutes can be found at: www.rilin.state.ri.us/Statutes/TITLE5/5-62/5-62-3.HTM
www.rilin.state.ri.us/Statutes/TITLE5/5-62/5-62-4.HTM

Connecticut (1988): Similar to California statute. Alteration and physical defacement is prohibited, and the artist retains the right to claim authorship. The full text of the statute can be found at: www.cga.ct.gov/2003/pub/Chap737c.htm

Nevada (1989): Statute prevents defacement, mutilation, and alteration of a work, if damage to the artist's reputation is reasonably foreseeable. In addition, the statute permits the author to claim or disclaim authorship. The full text of the statute can be found at: www.leg.state.nv.us/NRS/NRS-597.html#NRS597Sec730

South Dakota (1989): The statute protects the right to claim authorship of the work of art, the right to have the artist's name associated with the work, and the right to prevent degradation, mutilation or aesthetic ruining of the work. The full text of the statute can be found at: legis.state.sd.us/statutes/index.aspx?FuseAction=DisplayStatute&Type=Statute&Statute=1-22-10

Montana (1983): This is not a comprehensive moral rights statute. It simply states that an artist whose work is displayed by the state retains the right to claim authorship. The full text of the statute can be found at: <http://data.opi.state.mt.us/bills/1999/mca/22/2/22-2-407.htm>

Utah (1986): Provides limited protection, same as Montana. The full text of the statute can be found at: www.le.state.ut.us/~code/TITLE09/htm/09_05023.htm

Resources

ON THE WEB

St. Louis Volunteer Lawyers and Accountants for the Arts. *Anatomy of a Contract*, www.vlaa.org

St. Louis Volunteer Lawyers and Accountants for the Arts. *Copyright Basics*, www.vlaa.org

Visual Artists Rights Act

<http://www.law.uconn.edu/homes/swilf/ip/statutes/vara.htm>

BOOKS

Crawford, Tad. *Business and Legal Forms for Fine Artists*

Lerner, Ralph E. and Judith Bresler, *Art Law Volume 2*

Victoroff, Gregory T. *The Visual Artist's Business and Legal Guide*

These books and many others on arts law and business practices are available in the St. Louis Volunteer Lawyers and Accountants for the Arts library, located within the Regional Arts Commission office, 6128 Delmar. You can search the library's e-catalog by visiting www.vlaa.org.

Resources