

January 1992

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Recommended Citation

Keith A. Attlesey, *The Visual Artists Rights Act of 1990: The Art of Preserving Building Owners' Rights*, 22 Golden Gate U. L. Rev. (1992).
<http://digitalcommons.law.ggu.edu/ggulrev/vol22/iss2/6>

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THE VISUAL ARTISTS RIGHTS ACT OF 1990: THE ART OF PRESERVING BUILDING OWNERS' RIGHTS

I. INTRODUCTION

The Visual Artists Rights Act of 1990¹ was passed by Congress and signed into law by President Bush in December of 1990. Modeled in large part after the California Art Preservation Act,² the VARA protects artists'³ moral rights⁴ of

* I would like to thank Professor Thomas Goetzl of Golden Gate University School of Law for providing the original idea which served as the impetus for this article. Interviews with Professor Goetzl during September through November of 1991 also provided a great deal of information relevant to this comment.

1. Pub. L. No. 101-650, Title VI, 104 Stat. 5089 (1990), (codified as amended at 17 U.S.C. §§ 101, 106A, 113, 301 (1990)) [hereinafter VARA]. The VARA was included as part of the Judicial Improvements Act of 1990.

2. CAL. CIV. CODE § 987 (Deering 1991) [hereinafter California Act].

3. The term "artist" will be used throughout this article to describe those persons protected in the California Art Preservation Act. CAL. CIV. CODE § 987(b)(1) defines an artist as "the individual or individuals who create a work of fine art." The term "author" will be used to describe those persons protected by the VARA.

4. Moral rights are non-pecuniary rights which remain in the author even after a work of art has been conveyed to others. See Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 COLUM J.L. & ARTS, 477, 478 (1991) [hereinafter Ginsburg]. The author's personality remains in the work and is protected by these rights, regardless of who has actual possession of the work. See Katz, *The Doctrine of Moral Right and American Copyright-A Proposal*, 24 S. CAL. L. REV. 375, 381 (1951).

Eleven states recognized moral rights prior to the passage of the VARA. See CAL. CIV. CODE § 987 (Deering 1991), CONN. GEN. STAT. §§ 42-116s, 42-116t (1990), LA. REV. STAT. ANN. § 51:2152-:2156 (West 1990), ME. REV. STAT. ANN. tit. 27, § 303 (1989), MASS. ANN. LAWS ch. 231 § 85s (Law. Co-op. 1991), NEV. REV. STAT. ANN. § 598.970-.978 (Michie 1989), N.J. STAT. ANN. § 2A:24A-2 to :24A-8 (West 1990), N.M. STAT. ANN. § 13-4B-1 to -4B-3 (1991), N.Y. ARTS & CULT. AFF. LAW § 14.01, 14.03 (McKinney 1988), PA. STAT. ANN. tit. 73 § 2102-2108 (Purdon 1989), R.I. GEN. LAWS § 5-62-1 to -62-6 (1990). For a detailed comparison of these state laws, with the exception of Nevada's art protection act, see Damich, *State "Moral Rights" Statutes: An Analysis and Critique*, 13 COLUM. J.L. & ARTS 291, 343-47 (1989). See *infra* pp. 6-8 & notes 13-30 for a discussion of specific state art preservation act provisions and *infra* note 14 for a discussion of the two types of state art preservation acts. See Chan, *The California Art Preservation Act: A Safe Hamlet for "Moral Rights" in the U.S.*, 14 U.C. DAVIS L. REV. 975 (1981) for an excellent discussion on the California Art Preservation Act. See *infra* note 13 for the legislative history of the California Act.

Prior to passage of the state acts and the VARA, moral rights were not recognized by American courts. See, e.g. *Vargas v. Esquire*, 164 F.2d 522 (7th Cir. 1947) (where the court ruled that:

integrity⁵ and paternity⁶ and contains specific provisions concerning the right of integrity for art incorporated into buildings.⁷

[p]laintiff advances another theory which needs little discussion. It is predicated upon the contention that there is a distinction between the economic rights of an author capable of assignment and what are called "moral rights" of the author, said to be those necessary for the protection of his honor and integrity. These so called "moral rights," so we are informed, are recognized by the civil law of certain foreign countries...[t]he conception of moral rights of authors so fully recognized and developed in the civil law countries has not yet received acceptance in the law of the United States. No such right is referred to by legislation, court decision or writers.

What plaintiff seeks in reality is a change in the law of this country to conform to that of certain other countries. We need not stop to inquire whether such change, if desirable, is a matter for the legislature or judicial branch of the government; in any event we are not disposed to make any new law in this respect). (Vargas, 164 F.2d at 526).

See, e.g. *Geisel v. Poynter Products, Inc.*, 295 F. Supp. 331 (1968) (Vargas cited favorably where dolls were manufactured, advertised and sold as "Dr. Seuss" creations without Theodor Geisel's (Dr. Seuss) consent, because although Geisel found the dolls to be "tasteless, unattractive and of inferior quality" the defendant had a copyright over the cartoon from which the dolls were created). *Geisel*, 295 F. Supp. 331. See generally Roeder, *The Doctrine of Moral Rights: A Study in the Law of Artists and Creators*, 53 HARV. L. REV. 554 (1940); Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976); Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1 (1985).

Despite the lack of recognized moral rights, the American courts have sporadically applied common law doctrines to provide protection. See, e.g. *Granz v. Harris*, 198 F.2d 585 (2d Cir. 1952) (defendants sold records which were shortened versions of albums produced by plaintiff, and credited plaintiff with the shortened versions. The court held this was a breach of contract and unfair competition and granted an injunction against further sales of the shortened versions because "the harm to the plaintiff's reputation...was irreparable."). *Granz* 198 F.2d 585, 588. See, e.g. *Gilliam v. American Broadcasting Co., Inc.*, 538 F.2d 14 (2d Cir. 1976) (where plaintiff's movie was broadcast over television with over twenty four minutes edited out of the original film. The court held that the artist's rights had been injured in violation of section 43a of the Lanham Act). See generally Comment, *Moral Rights and the Realistic Limits of Artistic Control*, 14 GOLDEN GATE U.L. REV. 447 (1984).

5. 17 U.S.C. § 106(a)(3). The right of integrity provides the artist protection from alterations to his art, even after the artist has sold the work. For a more detailed discussion of this right see generally Roeder, *The Doctrine of Moral Rights: A Study in the Law of Artists and Creators*, 53 HARV. L. REV. 554 (1940); Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976); Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1 (1985).

6. 17 U.S.C. § 106(a)(1)(2). Paternity rights, also referred to as attribution, allow the author to claim credit for a work or, under appropriate circumstances, to remove his name from a work. See, e.g. *Diamond, Legal Protection for the "Moral Rights" of Authors and Other Creators*, 68 TRADEMARK REP. 244 (1978).

7. Section 113d of the VARA states in part:

(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

However, there is a profound difference between the two acts' provisions concerning art incorporated into buildings.⁸ The California Act presumes that, unless expressly reserved by a written agreement, the right of integrity is waived for works so attached to buildings that the art would be damaged⁹ if removed.¹⁰ But the VARA reverses this presumption so that the

(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 106(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 pay for its removal.

8. The importance of these protections is best illustrated by the types of harms which occur absent the VARA and state statutes. See Rose, *Calder's Pittsburgh: A violated and immobile mobile*, Artnews, January 1978, at 39 (an Alexander Calder mobile donated to the Allegheny County Airport in Pittsburgh was painted green and gold, the county colors, and immobilized without Calder's permission); McFadden, *Builder Says Costs Forced Scrapping of Bonwit Art*, N.Y. Times, June 9, 1980, § B at 3, col. 4 (developer Donald Trump had workers use jack hammers to destroy two sculptures incorporated into the facade of a building which Trump planned to raze and replace with a skyscraper); Gleuck, *Bank Cuts Up Noguchi Sculpture and Stores It*, N.Y. Times, Apr. 19, 1980, § 1, at 1, col. 4 (a 1600 pound sculpture hanging from the ceiling of a bank's lobby was cut into pieces and removed from the lobby, resulting in the complete destruction of the piece). See also *Visual Artists Rights Act of 1989: Hearings on H.R. 2690 Before the Subcomm. on Courts, Intellectual Property and Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 105 (1989) (Statement of Kenneth D. Snelson). Prior to the passage of the VARA, the artists of these works of art had no legal basis for challenging the destruction of their work.

9. Damage is used hereinafter to incorporate the language "defacement, mutilation, alteration, or destruction," as used in CAL. CIV. CODE § 987(h)(1) and "destruction, distortion, mutilation, or other modification" as written at 17 U.S.C. § 113(d).

10. CAL. CIV. CODE § 987(h) provides:

(1) [i]f a work of fine art cannot be removed from a building without substantial physical defacement, mutilation, alteration, or destruction of the work, the rights and duties created under this section, unless expressly reserved by an instrument in writing signed by the owner of the building, containing a legal description of the property and properly recorded, shall be deemed waived. The instrument, if properly recorded, shall be binding on subsequent owners of the building.

right of integrity is protected unless the author and building owner execute an agreement recognizing that incorporating the work into the building may subject the work to physical harm if removed. Thus, under the VARA, the artist's rights are greater than those of the building owner who wishes to alter her building.

For example, imagine a building owner decides to liven up a wall on the outside of her building. The owner allows a local artist, known for his expertise, to paint a mural covering the entire wall. The mural is completed and the artist and building owner do not execute an agreement concerning the mural's fate. Under the VARA, this building owner cannot, for the life of the author, change that wall in any way which will violate the mural's integrity.¹¹ However, in California the mural would not restrict the building owner from making any alterations to her building.¹²

Although the VARA provides much greater protection than the California Act for the artist's moral right of integrity, it goes well beyond the protection necessary, and in fact, imposes an unreasonably strict standard of protection on building owners who have art attached to their property.

This article will be divided into three sections focusing on the VARA's art in buildings provisions, and these provision's effects on artists and building owners. First, the various state art preservation acts will be compared and contrasted with the VARA, focusing particularly on the California Act. Second, the VARA's art in buildings section will be analyzed, focusing on 1) the development of the section, 2) how determining

(2) If the owner of a building wishes to remove a work of fine art which is part of the building but which can be removed from the building without substantial harm to the fine art, and in the course of or after removal, the owner intends to cause or allow the fine art to suffer physical defacement, mutilation, alteration, or destruction, the rights and duties created under this section shall apply unless the owner has diligently attempted without success to notify the artist...in writing of his intended action affecting the work of fine art, or unless he did provide notice and that person failed within 90 days either to remove the work or to pay for its removal. If the work is removed at the expense of the artist, his or her heir, beneficiary, devisee, or personal representative, title to the fine art shall pass to that person.

11. 17 U.S.C. § 113(d)(1).

12. CAL. CIV. CODE § 987(h)(1).

whether art is removable effects artists and building owners, and 3) the dilemma building owners face when art is attached to their buildings without their knowledge or consent. Finally, the article will offer recommendations on how to effectively eliminate the problems building owners face due to the VARA's art in buildings provisions.

II. THE ART PRESERVATION ACTS

A. THE CALIFORNIA ART PRESERVATION ACT

Moral rights in the United States were first recognized at law in California following the passage of the California Act in 1979.¹³ Subsequently, ten additional states joined California with similar legislation.¹⁴ The California Act provides protec-

13. *Id.* at § 987. The California Act went through two years of revisions before being passed in 1979. The bill was first drafted by Professor Thomas M. Goetzl of Golden Gate University School of Law, and completed on June 15, 1977. A second draft was produced on March 27, 1978. It was this second draft which was introduced to the California State Legislature by Senator Alan Sieroty on April 6, 1978, as SB 2143. This bill was amended by refining the definition of works protected from a "drawing, work of calligraphy, or work in any mixed media" to "drawing, or work in any mixed media, not provided in a multiple edition, and of recognized quality." A more significant amendment eliminated the sections which proposed permitting any person acting in the public interest to enforce the rights created by the bill. These provisions were not included in the passed version of the bill, but were codified separately as CAL. CIV. CODE § 989 (Deering 1991) two years later.

S.B. 2143 was not voted on as amended and the bill was reintroduced on March 21, 1979 as SB 668. This version contained the SB 2143 public interest sections. These sections were subsequently eliminated by the Senate on May 17, 1979. The definition of protected works was also amended to include only paintings, sculptures, or drawings of recognized quality. Language was, however, included which excluded works for hire by explicitly stating fine art shall not include work prepared under contract for commercial use by its purchaser. This version of the bill was signed by Governor Brown on August 1, 1979 and codified as section 987 of the Civil Code.

14. CONN. GEN. STAT. §§ 42-116s, 42-116t, LA. REV. STAT. ANN. § 51:2152-:2156, ME. REV. STAT. ANN. tit. 27, § 303, MASS. ANN. LAWS ch. 231 § 85s, NEV. REV. STAT. ANN. § 598.970-.978, N.J. STAT. ANN. § 2A:24A-2 to :24A-8, N.M. STAT. ANN. § 13-4B-1 to -4B-3, N.Y. ARTS & CULT. AFF. LAW § 14.01, 14.03, PA. STAT. ANN. tit. 73 § 2102-2108, R.I. GEN. LAWS § 5-62-1 to -62-6.

Although all eleven state statutes provide moral rights protection, the focus of the protected rights is in two categories. Five of the state statutes, ME. REV. STAT. ANN. tit. 27, § 303, NEV. REV. STAT. ANN. § 598.970-.978, N.J. STAT. ANN. § 2A:24A-2 to :24A-8, N.Y. ARTS & CULT. AFF. LAW § 14.01, 14.03, R.I. GEN. LAWS § 5-62-1 to -62-6, protect the integrity of the artist's reputation. The remaining six state acts, CAL. CIV. CODE § 987, CONN. GEN. STAT. §§ 42-116s, 42-116t, LA. REV. STAT. ANN. § 51:2152-2156, MASS. ANN. LAWS ch. 231 § 85s, N.M. STAT. ANN. § 13-4B-1 to -4B-3, PA. STAT. ANN. tit. 73 § 2102-2108, additionally protect the integrity of the art. This article focuses on those statutes which protect the art's integrity and the California Act will be used as the primary example.

tion for "fine art"¹⁶ which includes paintings, murals,¹⁶ sculptures, drawings or works of art in glass.¹⁷ However, only "fine art" of "recognized quality"¹⁸ is covered by the statute. Works for commercial use¹⁹ are not protected. Artists whose rights are violated can seek injunctive relief and actual and punitive damages.²⁰

The California Act also protects the moral rights of integrity²¹ and paternity²² and these rights exist for fifty years past the artist's death.²³ Special accommodations are provided for integrity rights for art attached to buildings.²⁴ If the art cannot be removed from the building without damage to the art, the owner is free from liability for damage caused by such removal, unless the owner waives the right of removal in an instrument in writing signed by the building owner.²⁵ If this right is waived and the instrument is properly recorded, then subsequent building owners are bound by the writing.²⁶ Art which can be removed from a building without damage to the art is protected by the statute.²⁷ In the latter circumstance, if

The six states which protect the art's integrity do so with language very similar to the provisions providing such protection in the California Act. However, the New Mexico statute limits the protection to art in the "public view." N.M. STAT. ANN. § 13-4B-3F. In each of these states the protections are extended to art attached to buildings which cannot be removed without damage to that art, provided such a right is agreed to in a properly recorded writing.

15. CAL. CIV. CODE § 987(b)(2).

16. See *Botello v. Shell Oil Co.*, 229 Cal. App. 3d 1130, 280 Cal. Rptr. 535 (1991) (the court determined that a mural was equivalent to a painting and therefore within the protection of the statute).

17. CAL. CIV. CODE § 987(b)(2).

18. Whether a work is of "recognized quality" is based on the decision of the trier of fact after the admission of testimony from artists, "art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art." *Id.* at § 987(g).

19. Commercial use is defined as "fine art created under a work-for-hire arrangement for use in advertising, magazines, newspapers, or other print and electronic media." *Id.* at § 987(b)(7).

20. *Id.* at § 987(e). In the event of punitive damages, the proceeds are distributed to charitable or educational organizations concerned with activities involving fine art in California.

21. *Id.* at § 987(h). See *supra* note 5 for a definition of the right of integrity. See also CAL. CIV. CODE § 989, enacted two years after CAL. CIV. CODE § 987, which extends the right of action available under § 987 to the public, rather than limiting this right to private parties.

22. CAL. CIV. CODE § 987(d). See *supra* note 6 for a definition of the right of paternity.

23. *Id.* at § 987(g).

24. *Id.* at § 987(h).

25. *Id.* at § 987(h)(1).

26. *Id.*

27. *Id.* at § 987(h)(2).

the owner has made a diligent attempt to notify the artist, without success, or if after receiving such notice, the artist fails to remove or pay for the art's removal within ninety days, then the moral rights protections do not apply.²⁸

Thus, prior to the enactment of the VARA, a work of "fine art" which had become part of a building such that removal would cause damage to the art was not protected. Unless the artist had obtained from the building owner a signed and properly recorded agreement to the contrary, the building owner was free to remove or alter the attached art in any manner she wished.²⁹ In contrast, protection for art attached to a building which could be removed without damaging the art, was provided if the notice requirements were met.³⁰

B. THE VISUAL ARTISTS RIGHTS ACT OF 1990

Although both the VARA and the California Act were drafted to provide moral rights protections for authors, the VARA contains several provisions which are distinct from the California Act. Rather than the term "fine art,"³¹ as used in the California Act, the VARA uses the phrase "visual art"³² to describe those works protected. The VARA's use of the term "visual art" is significant because it narrowly defines the types of works protected and those excluded.³³ Another important

28. *Id.* See *supra* note 10 for full text of this section.

29. *Id.*

30. *Id.*

31. *Id.* at § 987(b)(2).

32. 17 U.S.C. § 101.

33. *Id.* The VARA defines the class of protected and excluded works as follows in § 101:

(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;

distinction between the two acts' definitional schemes is that works of "recognized quality"³⁴ are not included within the VARA's definition of protected works, but works of "recognized stature" are protected, at least with regard to integrity rights.³⁵ The definition of "recognized stature" is not provided in the VARA. Therefore, contrary to the California Act, the question of who determines what such a work is and how they come to this determination is unanswered.³⁶ A third important

(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.

The intent was to limit the works which fit into protection. See *Moral Rights in Our Copyright Laws: Hearings on S. 1198 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. J-101-25, at 25 (June 20, 1989) [hereinafter 1989 *Hearings*] (statement of Senator Edward J. Markey) (who wrote:

I would like to stress that we have gone to extreme lengths to very narrowly define the works of art that will be covered...I must take this opportunity to emphasize that this legislation covers only a very select group of artists whose works have been allowed to fall through the existing gaps in our copyright law.).

See 136 CONG. REC. E 3716 (1990) (statement of Rep. Levitas) (who wrote:

When the House of Representatives first considered the Visual Artists Rights Act of 1990, I spoke at length about the care the House had taken to craft a narrow legislation that protected certain limited categories of work of visual art... As the House turns again to the consideration of visual artist legislation, I feel compelled to reiterate my earlier comments regarding the inapplicability of this legislation outside of the narrow context of limited categories of works of visual art.).

34. CAL. CIV. CODE § 987(b)(2). See *supra* note 18 for a definition of recognized quality.

35. 17 U.S.C. § 106A(a)(3)(A) provides that authors have the right: "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."

36. See CAL. CIV. CODE § 987(g) *supra* note 18 for the full text of the California provision which explains how the trier of fact in California is to determine what a work of recognized quality is.

A possible solution to this problem is to drop the "recognized stature" provision entirely from the VARA. This would comport with the intent to limit the scope of protected works because a debate as to whether a work is of recognized stature would not have to be conducted. Instead, the art would simply fit within the strict definitional scheme of the VARA. Indeed, this was the recommendation that the House of Representatives Committee on the Judiciary made in its report on the VARA. See H.R. REP. NO. 514, 101st Cong., 2d Sess., at 15 (1990) [hereinafter *Report*].

difference between the two acts is that the moral rights of paternity and integrity afforded by the VARA³⁷ last only for the author's life,³⁸ rather than for fifty years past the death of the author as in California.³⁹

The VARA also devotes specific sections to art in buildings.⁴⁰ Protection is provided for art which is deemed irremovable. Irremovable art is art which cannot be removed from a building without damage. Such art may not be removed for the author's life unless the building owner and author enter into a written agreement declaring that the work may be damaged if removed.⁴¹ Thus, absent a written agreement, the building owner may be forced to protect the work for the author's life. Removable art, or art which may be removed from a building without damage, is similarly protected.⁴² However, if a building owner complies with the VARA's notice requirements, she may remove the art during the author's life without liability under the VARA.⁴³

The effect of this section is a trap for the building owner lacking knowledge of the VARA's intricacies. If no written agreement is entered into addressing the removal of art incorporated into a building, building owners may be forced to protect this art for the author's life. This result is transferred to subsequent building owners who purchase buildings with art attached so that it cannot be removed without damage.⁴⁴

An alternative solution is to provide a provision such as exists in the California Act. See 1989 *Hearings*, *supra* note 33, at 106-7 (statement of Senator Peter H. Karlen) (who described the effectiveness of such a provision in California.) *But cf. Id.* at 73 (written response of Jack E. Brown to supplemental questions) ("[d]etermination of whether a work of art is "of recognized stature" is self evidently subject to subjective factors which may lead to disrespect for the decisions made. It would be most unfortunate if the statute led to judges attempting to decide "what is art?").

37. 17 U.S.C. §§ 106A, 113.

38. *Id.* at § 106A. See *infra* pp. 12-14 & notes 45-56 for a discussion of the possible effects of federal preemption over the state art preservation acts with regard to the duration of protection.

39. CAL. CIV. CODE § 987(g).

40. 17 U.S.C. § 113.

41. *Id.* at § 113(d)(1).

42. *Id.* at § 113(d)(2). See *supra* note 7 for the full text of this section.

43. *Id.*

44. 17 U.S.C. § 113(d). The rights of subsequent building owners were provided for in the 1986 version of the VARA, S. 2796, 99th Cong., 2d Sess. (1986) [hereinafter 1986 *bill*], and the 1987 version of the VARA, S. 1619, 100th Cong., 1st Sess. (1987); H.R. 3221, 100th Cong., 1st Sess. (1987) [hereinafter 1987 *bills*], through express language. Subsequent building owners were bound if the original owner had entered into a written agreement granting the protections under the VARA and this agreement was properly recorded. These provisions were identical to those which control in the California Act. See *supra* note 10.

Simply conveying the building to another does not cut off the author's rights under the VARA, despite the absence of a written agreement.

Finally, the VARA preempts the various state art preservation acts,⁴⁵ though the extent of this preemption is not entirely clear. The VARA preempts "all legal or equitable rights that are equivalent to any of the rights conferred by" the VARA and "no person is entitled to any right or equivalent right in any work of "visual art" under the common law or statutes of any State."⁴⁶ However, the preemption is not effective 1) if the cause of action arose prior to June 1, 1991,⁴⁷ 2) against activities violating legal or equitable rights not equivalent to the paternity and integrity rights protected by the VARA,⁴⁸ 3) against "activities violating legal or equitable rights which extend beyond the life of the author."⁴⁹

The first exception's effect is clear. Any cause of action arising before June 1, 1991, is not preempted, but all those arising after this date are preempted. The second exception, however, is capable of more than one interpretation. This provision could mean that only those portions of the state art preservation acts which are identical to the VARA are preempted.⁵⁰ An alternative reading, though, could be that the state statutes need not be exactly equivalent to the VARA in order to be preempted.⁵¹

With the change in the VARA's art in buildings section in 1989, the language concerning subsequent owners was eliminated. Despite the absence of this language, the rights of subsequent building owners is certain. Subsequent building owners are bound by the VARA because the art in buildings section is applied through the provisions providing moral rights and these rights last for the life of the author. 17 U.S.C. § 113(d). Indeed this intent was expressed in the House Report written by the Committee on the Judiciary concerning the VARA of 1990. *See Report, supra* note 36, at 20. The report explains:

[w]hen an author and building owner agree to the installation [of art] in a particular building, the agreement in effect extends to all subsequent owners of that building. Whether [the moral rights] apply is controlled not by who owns the building at any given time, but by the fact of installation of a work in a building and the circumstances surrounding that installation. *Report, supra* note 36, at 20.

45. 17 U.S.C. § 301(f).

46. *Id.* at § 301(f)(1).

47. *Id.* at § 301(f)(2)(A).

48. *Id.* at § 301(f)(2)(B).

49. *Id.* at § 301(f)(2)(C).

50. *See, e.g.* 2 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 8.21[B][f] (1991).

51. *See, e.g.* Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39, CATH. U.L. REV. 945, 972 (1990).

The third exception is also unclear. This exception seems to allow the states with art preservation acts, which extend the protections beyond the life of the author,⁵² to become effective only upon the death of the author.⁵³ For example, in California the VARA would protect all works of "visual art," but once the author dies, the California Act's provisions become effective, including the duration of the rights which extend for fifty years past the artist's death. However, this provision may also mean that those states with art preservation acts granting rights for the life of the author are preempted, but state laws which allow moral rights to extend past the artist's death are not preempted.⁵⁴ The result under this second interpretation would be the elimination of the burden placed on building owners by the VARA's art in buildings section, at least for those states with art in buildings sections which extend protection for fifty years beyond the artist's death.⁵⁵ However, even if this second interpretation is correct, the vast majority of states will continue to be subjected to the burdens placed on building owners by the VARA because only five states have art preservation acts which protect the integrity of art attached to buildings for fifty years past the author's death.⁵⁶

Thus, the VARA and the California Act contain significant differences. Under the VARA, although the group of protected works is more narrowly defined than under the California Act, the VARA's use of the term "recognized stature" creates the possibility that the group of protected works will be expanded through a broad reading of "recognized stature." The VARA also preempts the various state statutes, but the extent of this preemption is unclear. Finally, while the California Act contains no unreasonable burdens on building owners, the VARA's art in building section creates a potential hazard for building owners who do not have knowledge of the possible adverse effects of these provisions.

52. The following states provide protection during the artist's life and for fifty years after the artist's death; CAL. CIV. CODE § 987, CONN. GEN. STAT. §§ 42-116s, 42-116t, MASS. ANN. LAWS ch. 231 § 85s, N.M. STAT. ANN. § 13-4B-1 to -4B-3, PA. STAT. ANN. tit. 73 § 2102-2108. The remaining states with art preservation acts have no express language concerning the duration of the rights afforded by the acts.

53. NIMMER, *supra* note 50, at § 8.21[B][f].

54. Ginsburg, *supra* note 4, at 490.

55. See CAL. CIV. CODE § 987, CONN. GEN. STAT. §§ 42-116s, 42-116t, MASS. ANN. LAWS ch. 231 § 85s, N.M. STAT. ANN. § 13-4B-1 to -4B-3, PA. STAT. ANN. tit. 73 § 2102-2108.

56. *Id.*

III. ART IN BUILDINGS

A. DEVELOPMENT OF THE PROVISION

The Federal legislation was first introduced to Congress in 1986 by Senator Edward Kennedy.⁵⁷ The provisions in the Visual Artist Rights Acts of 1986⁵⁸ and 1987,⁵⁹ applying to art in buildings, were very similar in language and identical in

57. As originally introduced as the Visual Artists Rights Amendment of 1986, 1986 bill, *supra* note 44, the VARA was drafted to 1) eliminate the requirement in the then current Copyright law that copyright notice appear on all works, 2) provide moral rights for artists, and 3) require a resale royalty to be paid to artists for all subsequent sales of their protected works. The bill was reintroduced in 1987, 1987 bills, *supra* note 44, and in 1989 as S. 1198, 101st Cong., 1st Sess. (1989); H.R. 2690 101st Cong., 1st Sess. (1989) [hereinafter 1989 bills], and was finally passed in 1990. An initial stumbling block to passage was the resale royalty provision. The final version did not completely abolish this provision, but instead mandated a study to be conducted by the Register of Copyrights concerning the feasibility of implementing a resale royalty provision. The Congressional Record contains a wealth of material concerning the debate over the resale royalty provisions. See generally *Visual Artists Rights Act of 1987: Hearings on S. 1619 Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary*: 100th Cong., 1st Sess. J-100-45 at 82-324 (December 3, 1987) [hereinafter 1987 Senate Hearing]; *Visual Artists Rights Act of 1987: Hearing on H.R. 3221 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary*: 100th Cong., 2d Sess. 104 (June 9, 1989). Considering California was the first state to pass an art preservation act, it is interesting to note that California was also the first and only state to pass a resale royalties act. See CAL. CIV. CODE § 986.

The enactment of the Berne Convention Implementation Act of 1988 resulted in the copyright notice section of the original VARA being eliminated because the Berne Convention provisions contained such a requirement. The Berne Convention recognizes the moral rights of paternity and integrity and is an international treaty intended to provide copyright protection to authors worldwide. The United States adhered to the Berne Convention on March 1, 1989 with the enactment of The Berne Convention Implementation Act of 1988, PUB. L. No. 100-568, 102 Stat. 2853. The United States became the seventy-eighth member of the convention with the enactment of this legislation. However, the moral rights provision of the Berne Convention was not adopted. This provision is contained in Article 6bis of the Berne convention and provides:

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.

WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (Paris Act, 1978). Thus it was left to Congress to either subsequently adopt these provisions, or pass federal legislation filling the void created by not fully complying with the Berne Convention requirements.

58. 1986 bill, *supra* note 44.

59. 1987 bills, *supra* note 44.

effect to the California Act.⁶⁰ This language, and as a result, the section's effect, was considerably altered in the Visual Artists Rights Act of 1989.⁶¹ The 1989 version differed significantly from the earlier versions because unless the author and building owner consented in writing to the installation of "visual art" in a building where the art could not be removed without damage, then the moral rights applied. Thus, the legislation's effect was to require a written agreement between a building owner and the author of a work for the rights not to apply; where no such agreement was executed, the art was automatically protected. Therefore, building owners would be forced to protect art and not alter their buildings for the author's life simply because an agreement recognizing the author's moral rights was not entered into.

The reason for a provision providing such great protection for authors, and so burdensome on building owners is not made clear by looking to the legislative history. The art in buildings provisions which exist under the VARA were first proposed in the Visual Artists Rights Act of 1989.⁶² The effects of

60. See *supra* note 10 for the California Act's art in buildings section language. The 1986 bill, *supra* note 44 provides:

(d)(1) [i]f a pictorial, graphic, or sculptural work of recognized quality cannot be removed from a building without distortion, mutilation, or other alteration of such work, the artist's rights...unless expressly reserved by an instrument in writing signed by the owner of such building and properly recorded...shall be deemed waived. Such instrument, if recorded, shall be binding on subsequent owners of such building.

The 1987 bills, *supra*, note 44 both provide:

(d)(1) [i]f a pictorial, graphic, or sculptural work of fine art cannot be removed from a building without distortion, mutilation, or other alteration of such work, the author's rights...unless expressly reserved by an instrument in writing signed by the owner of such building and the author of the work of fine art and properly recorded, shall be deemed waived.

61. 1989 bills, *supra* note 57. The art in buildings section of these bills provide if:

(I) 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

(II) The author, or if the author is deceased, the person described in section 106(E)(2), consented to the installation of the work in the building in a written instrument signed by the owner of the building and the author or such person,

then the rights conferred by paragraphs (2) and (3) of section 106(A) [the rights of paternity and integrity] shall not apply, except as may otherwise be agreed in a written instrument signed by such owner and the author or such person. (Emphasis added).

62. *Id.*

this change in language were not widely recognized when the bill was presented in 1989.⁶³ Indeed, only one individual noticed the effect of the provision⁶⁴ throughout extensive discussion in later hearings.⁶⁵ Subsequently, no further discussion of the effect of the VARA's art in building section was conducted and the 1990 version was passed maintaining the present burden on building owners. Thus, it appears that the problem was simply overlooked or not addressed in an appropriate manner, and building owners are now faced with the consequences of this provision.⁶⁶

63. Senator Kennedy, who sponsored the Senate version of the bill, 1989 bills, *supra* note 57, compared the 1989 version with the bills of 1986, 1986 bill, *supra* note 44, and 1987, 1987 bills, *supra* note 44, and described the earlier act's art in buildings provisions as the "same as S. 1198." 1989 Hearings, *supra* note 33 (statement of Sen. Kennedy).

64. Senator Hatch observed that:

S. 1619 presumed that the right of integrity in a work of visual art incorporated in a building was waived unless expressly reserved by a recorded instrument. The present bill (S. 1198) makes the opposite presumption, that such a work of art cannot be removed unless the author executed an agreement consenting to its installation. 1989 Hearings, *supra* note 33, at 20 (statement of Sen. Hatch).

65. See *Id.* at 116 (Answers to supplemental questions by Peter H. Karlens. When asked to suggest language that would accomplish the goal of allowing property with works of fine art incorporated to be freely alienable, Karlen provided the following suggestion:

[w]here a work of fine art has been incorporated in or made part of a building or public structure in such a way that removing the work from the building or public structure will cause the destruction, distortion, mutilation, or other modification of the work...and the author...consented to the installation of the work in the building or public structure in a written instrument signed by the owner of the building or public structure and the author or such person, then the rights...shall not apply...."

This language has the same effect as the VARA, thus the effect was overlooked.) See *Visual Artists Rights Act of 1989: Hearings on H.R. 2690 Before the Subcomm. on Courts, Intellectual Property and Administration of Justice of the House Comm. on the Judiciary, 100th Cong., 1st Sess. 105, at 91 (October 18, 1989) [hereinafter Oct. 1989 Hearings]* (Statement of Jane C. Ginsburg where Professor Ginsburg recognized that a work would "remain covered by the general moral rights" of the VARA where no agreement was executed, but failed to notice the burdensome effect on building owners.) See *Report*, *supra* note 47, at 20 (where the purpose of the art in buildings provisions was declared to be to "ensure that the author is made fully aware of the circumstances surrounding the installation and potential removal of the work and has nevertheless knowingly subjected the work to possible modifications that would otherwise be actionable...." The Committee failed to recognize that if such an agreement were not entered into, the right of integrity is guaranteed).

66. An article was recently written by Professor Thomas Goetzl on the subject of the VARA's art in building provisions. Goetzl, *Federal and state laws protecting artists' rights in their creations can create traps for unwary owners*, Am. Law. Media, L.P., The San Francisco Recorder, Oct. 8, 1991, § Commentary; Property Tax, at 8. Professor Goetzl's article was the first to outline the problems contained in the VARA's art in building provisions.

B. WHAT IS REMOVABLE

The art in buildings sections of the VARA provides different rights to artists and building owners depending upon whether art attached to a building may be removed without damage.⁶⁷ If no written agreement is executed, art which cannot be removed without damage is protected for the author's life and the building owner will be barred from altering the building.⁶⁸ However, removable art is protected until the building owner wishes to remove the work and satisfies the art in building section's notice requirements.⁶⁹ Thus, the distinction between removable and non-removable art is vital because the determination of whether a work is removable or not will have drastically different effects on building owners' and artists' rights.⁷⁰

Under the VARA if the majority of art is deemed removable, most art would fall under section 113(d)(2)⁷¹ and be protected only until the building owner decided to remove the work.⁷² The art could then be salvaged if the artist or building owner paid for the removal.⁷³ However, the economic reality of an expensive removal would prevent either party from paying for the removal. The end result of a broad reading of removable would therefore be that most art would not be preserved. Clearly, eliminating the moral rights of authors was not the intent of the VARA,⁷⁴ but this would be the result if most art is construed as removable under the VARA. Even though a broad interpretation of removable art under the VARA provides some protection

67. 17 U.S.C. § 113(d). See *supra* note 7 for full text of these provisions.

68. *Id.* at § 113(d)(1).

69. *Id.* at § 113(d)(2).

70. Determining what is and is not removable will, in the future, become increasingly important. Currently, most art can be removed using modern technology, though the cost may be prohibitively expensive. See, e.g. Stockton, *Mexicans Seek to Save Murals in Quake Ruins*, N.Y. Times, Nov. 16, 1985, § 1, at 13, col. 1.; Note, Gantz, *Protecting Artists' Moral Rights: A Critique of the California Art Preservation Act as a Model For Statutory Reform*, 45 Geo. Wash. L. Rev. 873, 885, note 81 (1981). With the continual advance of technology, the removal cost will inevitably decrease and a larger group of art will be included in the class of removable works.

71. 17 U.S.C. § 113(d)(2).

72. *Id.*

73. *Id.*

74. Providing moral rights was one of the three major reasons the VARA was introduced. See sources cited *supra* note 57. See 133 CONG. REC. E3425 (1987) (statement of Rep. Markey) ("[t]his legislation...would amend copyright law to...recognize the moral right."). See 135 CONG. REC. S6811 (1989) (statement of Sen. Kasten) ("[t]his is an important and necessary bill to provide rights of integrity and attribution to visual artists...[w]hen those works are altered or destroyed, they are gone forever. We have a duty to protect them.").

for the art's preservation, this protection is limited in its effect.

Conversely, if the courts interpret the removable types of work narrowly, more art will be protected. A narrow reading of removable would mean that only those works which could be removed at a reasonable cost could be included in this class. Therefore, the opportunity for an artist to salvage his work is greater because it could be achieved at a lower cost. It follows that more art could be protected within the class of removable. Additionally, absent a written agreement, a greater number of building owners will be required to protect art incorporated into their buildings and not alter the buildings where removing the art could damage the art.⁷⁵ Thus, more art could be protected by section 113(d)(1).⁷⁶

Therefore, under a narrow interpretation of removable art, rather than a broad interpretation, more art would be protected for the author's life and more removable art would have an opportunity to be salvaged. The narrow reading of removable art is thus an apparently superior interpretation to a broad reading of removable art under the VARA.

The burden on the artist and building owner of preserving the art must also be inquired into. The narrow interpretation of removable art would shift the burden of preservation to the building owner. The art would hinder the building owner from making any alterations to her building if such alterations would cause damage to the art.⁷⁷ The art would tie the building owner's hands behind her back. In the ideal scenario, the building owner will have knowledge of this unfavorable possibility and will contract to avoid such a result. However, the reality is that most building owners will not even have knowledge of the VARA, let alone the intricacies of its provisions. Thus, building owners will be stuck with a building that cannot be altered because art has been incorporated into the building under a narrow interpretation of removability.

The author's rights under a narrow interpretation of removable art are very strong. Unless the owner and the author agreed in a writing that the art was not removable without

75. 17 U.S.C. § 113(d)(1).

76. *Id.*

77. *Id.*

damage, then the art will be protected for the life of the author. Obviously, the author will favor such an interpretation.⁷⁸ However, when the author's interest is weighed against the building owner's, this protection appears overly restrictive on building owners.

If removable art is given a broad interpretation, the building owner will not be forced to protect the art if she desires to alter her building, and the author will have an opportunity to remove the art if he raises appropriate funds.⁷⁹ But, there would still be the danger that art would be deemed not removable and, as a result, the building owner would be stuck with the art and a building which could not be altered.⁸⁰ Thus, under the VARA in either a broad or narrow reading of removable art, the building owner would be held hostage by the art. However, the most favorable interpretation for building owners is that the majority of art is removable. This interpretation would decrease the number of occurrences where art must be protected and the building not altered simply because art has been incorporated into the building.

C. ART ATTACHED WITHOUT OWNER'S KNOWLEDGE OR CONSENT

The VARA fails to define the rights of building owners where art is attached to buildings without their knowledge or consent. Manifestly, art attached to buildings so that it cannot be removed without damage is protected by the VARA for the author's life.⁸¹ Thus, it seems that building owners must protect art attached to their buildings for the author's life, despite the fact that it was incorporated without their knowledge or consent. Obviously, such a result is unfair to building owners, but it is the effect of the VARA's art in buildings section.

The fact that the VARA protects art attached to buildings without the owner's knowledge or consent further illustrates the flaws inherent in the VARA's art in buildings section. Such a harsh result is one which courts would necessarily seek to avoid. Nevertheless, valid arguments must be presented to deter the VARA's adverse effect on building owners where art is attached without their knowledge or consent. Arguments in

78. *Id.*

79. *Id.* at § 113(d)(2).

80. *Id.* at § 113(d)(1).

81. *Id.*

favor of building owners can be premised on both the VARA's provisions and on policy.

Arguments based on the VARA's provisions arise from three separate sections within the VARA. The first is the section defining "visual art."⁸² The argument here is that the work not consented to is one which fails to fit within the definition of "visual art." Unless the work is outside the definition of "visual art," this argument will fail.

If the work is defined as "visual art," the second argument is that the work is not of "recognized stature."⁸³ This phrase is not defined in the VARA, and no method for determining "recognized stature" is expressed.⁸⁴ Thus, there is a great deal of room for the courts to construe any work which is attached without the owner's knowledge or consent to not be of "recognized stature" and therefore outside the scope of the VARA. This argument will prove to be the most effective because it allows the court a simple means to escape the undesirable result of forcing building owners to protect art which is incorporated into their buildings without their knowledge or consent.

However, it is possible that a work of "visual art" which is of "recognized stature" could be attached without the building owner's knowledge or consent. For example, a work attached with the permission of a tenant in the building may fit within this category. In this scenario, the final argument under the VARA is that the work is removable.⁸⁵ If the art is deemed removable, the building owner may remove the work, provided she meets the notice requirements.⁸⁶

However, although this argument, if successful, allows building owners to remove undesired works from their buildings, the VARA still imposes an unreasonable burden on the

82. 17 U.S.C. § 101.

83. *Id.* at § 106A(a)(3)(A). See *supra* note 35 for the text of this provision.

84. The California Act provides a method for determining whether a work is of recognized stature, although the California Act refers to this language as recognized quality. See *supra* note 18.

85. See *supra* notes 67-80 and text pp. 18-22 for a discussion of the importance of determining removability.

86. 17 U.S.C. § 113(d)(2). For the full text of this section and the notice requirements, see *supra* note 7. Under the California Act, the building owner would not assert that the art is removable because this would require the building owner to meet the notice requirements. CAL. CIV. CODE § 987(h)(2). If the art is attached so that it cannot be removed, under the state scheme, building owners are free from liability if they do in fact remove the work. *Id.* at § 987(h)(1).

building owners. They are forced to comply with the VARA notice requirements and are hindered from taking any action until these notice requirements are met.⁸⁷ Although the result, then, is imperfect, the underlying purpose of removing art which is attached without consent or knowledge of the building owner is achieved.

Coupled with the arguments asserted under the VARA, building owners have strong policy arguments. Forcing building owners to protect works which are attached to buildings without their knowledge or consent is a wholly undesirable result. Setting such a precedent has frightening implications. Art could keep building owners from altering their buildings, simply because it was attached to the building. Art, through its attachment to buildings, could effectively become a tool for those opposed to development. Additionally, the entire burden would fall upon building owners to protect a work which they never consented to. These arguments illustrate some of the inequities which may result if the VARA is permitted to operate as written.

IV. RECOMMENDATIONS

The most effective way to alleviate the problems caused by the VARA's art in buildings provisions is to amend these sections so that they are identical to the California Act's provisions. Such an amendment would solve the problems now facing building owners.

Under the VARA, where art is determined to be irremovable, the building owner must protect the art for the artist's life. Such a burden does not exist under the California Act's provisions. Under the California Act, if the art is deemed removable, then the building owner must only provide notice to the author that the work will be removed. However, if the work is determined to be irremovable, then the building owner may remove the work without fear that the author could hold him liable for damage to the art. Thus, amending the VARA to follow the California Act allows building owners to incorporate art into their buildings without fear that they could not subsequently alter their buildings.

87. 17 U.S.C. § 113(d)(2). The California Act also suffers from this burden placed on building owners, however, if the art is not removable, the building owner is free to remove the work. Thus, in California, the problem of art attached without the owners consent is limited only to those situations where the art is removable.

Where art is attached to a building without the building owner's knowledge or consent, under the VARA, the building owner must nevertheless protect that work for the author's life if the work is irremovable. Such a result does not occur under the California Act. Under the California Act, the building owner may remove the work without liability, unless a written agreement exists providing protections for the art. Therefore, the California Act's art in building provisions afford building owners greater rights where irremovable art is attached to their buildings without their knowledge or consent.

Absent an amendment to the VARA eliminating the adverse effects of the art in building provisions, building owners must unfortunately approach the opportunity to incorporate art into their buildings with caution. Depending on when art is incorporated into the building, building owners may need to execute a written agreement with the author covering each parties' rights. Failure to draft an agreement may automatically place into effect the VARA's art in building provisions, which building owners should obviously avoid.

If art was incorporated into a building prior to June 1, 1991,⁸⁸ a written agreement between the author and owner is not required to escape the impact of the VARA's art in building provisions.⁸⁹ Rather, unless a written agreement was entered into defining the rights of each party, then the art is protected only by any applicable state statutes in effect at the time the art was incorporated into the building. For example, if a mural was incorporated into a California building on May 26, 1991, and no written agreement concerning the author's rights was executed, then the California Act's art in building provisions will control. Thus, entering into a written agreement defining the rights of building owners and authors is important only for art incorporated after June 1, 1991, absent a written agreement covering each party's rights.

Since the VARA permits authors to waive their integrity rights,⁹⁰ building owners and authors have a great deal of lat-

88. *Id.* at § 107(a). This section provides that the VARA does not become effective until June 1, 1991.

89. *Id.* at § 113(d)(1)(B).

90. *Id.* at § 106(e). If a work of art has more than one author, a waiver of each author's rights may be effectuated by a single author acting alone. Therefore, a building owner need only negotiate with one author to draft an enforceable agreement which waives or alters any author's moral rights in the art.

itude to negotiate and draft an effective agreement which protects the art, but simultaneously permits the building owner freedom from the impact of the VARA's art in building provisions. In drafting such an agreement, the most important issue for building owners to focus on is that absent a written agreement altering the VARA's art in building provisions, art incorporated into their building will control any alterations to the building for the author's life. Since it is the author's rights, not the art, protected by the art in building sections,⁹¹ building owners may negotiate with authors to limit or completely waive the protections afforded authors by the VARA. For example, an agreement between the two parties may provide that the author completely waives any integrity rights he has in his art. Alternatively, an agreement may limit the number of years such rights extend to a term less than the author's life. Because of the author's ability to waive his rights, both parties are permitted wide discretion to negotiate an agreeable agreement, and the agreement may take any form the parties desire. Thus, building owners should take advantage of this freedom and be careful to draft an agreement clearly defining the authors rights in works of art incorporated into their buildings.

V. CONCLUSION

The VARA provides important protections for artist's, but does so at a great expense to building owners. In particular, the art in buildings section of the VARA creates an unreasonable burden on building owners where art is determined not to be removable because it forces building owners to protect art and not alter their buildings for the author's life. The determination of whether or not art is removable will have a profound impact on building owners and artists, even where art is attached without the building owner's knowledge or consent. A simple solution to these problems is to amend the VARA's art in building provisions so that they are identical to the California Act's provisions. Such an amendment would alleviate the burden placed on building owners where irremovable art is attached to their buildings by allowing the building owners to remove the art without liability. However, in the interim, building owners must be made aware of these problems and take appropriate steps to protect themselves.

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91. *Id.* at § 106(a).

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