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THE VISUAL ARTISTS RIGHTS ACT OF 1990: FURTHER DEFINING THE RIGHTS AND DUTIES OF ARTISTS AND REAL PROPERTY OWNERS

I. INTRODUCTION

In 1937, the Rutgers Presbyterian Church in Manhattan invited painters to enter a competition to design and paint a mural on the rear wall of the church and unanimously selected the designs and sketches of artist Alfred D. Crimi.¹ After the mural was completed, some parishioners objected to the painting feeling that “a portrayal of Christ with so much of his chest bare placed more emphasis on His physical attributes than on His spiritual qualities.”² The objections evidently grew louder, for in 1946 the mural was painted over without the artist being notified.³

Crimi sued to compel the church to remove the overpaint, or in the alternative, to have the fresco returned to him.⁴ He based his suit on the doctrine of *droit moral*,⁵ which recognizes a legally protectible interest in the physical integrity of a work of art even after it is sold. The court was unable to find any American authority for the doctrine and ruled against him, rationalizing that if Crimi desired to retain rights in his work, he should have done so in the contract.⁶

In 1980, the Bank of Tokyo decided to remove from the lobby of its Wall Street branch a massive sculpture by the well-

1. *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S.2d 813, 813-14 (Sup. Ct. 1949).

2. *Id.* at 815.

3. *Id.* Forty years later, Crimi recalled the experience: “I cannot describe the trauma that gradually overtook me. I could not believe that it was possible, in the twentieth century, that such a bestial mentality existed.” Levy, *Artists’ Moral Rights: Will Federal Legislation Have any Real Impact in Deterring the Mutilation and Destruction of Artworks?*, 11 L.A. LAW. 11 (Mar. 1988).

4. *Crimi*, 89 N.Y.S. 2d at 815.

5. See generally, Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976) and Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARVARD L. REV. 554 (1940) for a more complete discussion of *droit moral*.

6. *Crimi*, 89 N.Y.S.2d at 819.

known American artist, Isamu Noguchi. In order to remove the sculpture, the Bank had to cut it into pieces, effectively destroying it.⁷ Again, the artist was not notified. Noguchi felt the Bank's action was "vandalism," but he was left with no legal recourse; he had transferred all his property rights in the sculpture to the Bank.⁸

These two examples illustrate the competing interests of artists and real property owners when artwork is incorporated into buildings. While eleven states have enacted legislation creating moral rights for artists,⁹ until recently there was no federal law addressing the issue. The Visual Artists Rights Act of 1990,¹⁰ which became effective June 1, 1991,¹¹ creates federal moral rights for artists¹² and contains provisions specifically covering artwork incorporated into buildings.¹³ This article will begin with a brief overview of VARA and a detailed analysis of the provisions covering artwork incorporated into buildings. The focus of the article will address the many problems concerning the rights and duties of artists and real property owners under VARA, and will propose solutions to these problems that will best serve the interests of both.

II. THE VISUAL ARTISTS RIGHTS ACT

A. AN OVERVIEW

VARA preserves the right of attribution and integrity for works of visual art.¹⁴ The right of attribution allows artists to

7. Gleuck, *Bank Cuts Up Noguchi Sculpture and Stores It*, N.Y. Times, Apr. 19, 1980, § 1, at 1, col. 4.

8. *Id.*

9. Cal. Civ. Code §§ 980-990 (West 1982 & Supp. 1992); Conn. Gen. Stat. Ann. §§ 42-116a to 42-116t (West 1987); La. Rev. Stat. Ann. §§ 51:2151-51:2156 (West 1987); Me. Rev. Stat. Ann. tit. 27 § 303 (West 1988); Mass. Gen. Laws Ann. ch. 231 § 85S (West Supp. 1991); Nev. Rev. Stat. §§ 598.970-.978 (1987); N.J. Stat. Ann. §§ 2A:24A-1 to 2A:24-8 (West 1987); N.M. Stat. Ann. §§ 56-11-1 to 56-11-3 (Michie 1986); N.Y. Arts & Cult. Aff. Law §§ 11.01-16.01 (West 1984 & Supp. 1992); Pa. Stat. Ann. tit. 73 §§ 2101-2110 (Purdon Supp. 1991); R.I. Gen. Laws §§ 5-62-2 to 5-62-6 (Michie 1987).

10. The Visual Artists Rights Act of 1990, Pub. L. No. 101-650, Title IV, 104 Stat. 5089, 5128 (1990) (codified as amended in scattered sections of 17 U.S.C. (Supp. 1991) [hereinafter VARA]).

11. See 17 U.S.C. § 106A [Note (a)] (Supp. 1991) which states that the Act will take effect six months after the date of the enactment of the Act, which was Dec. 1, 1990.

12. See 17 U.S.C. § 106A (Supp. 1991).

13. See 17 U.S.C. § 113(d) (Supp. 1991).

14. See generally 17 U.S.C. §§ 101 & 106A (Supp. 1991). Under VARA, "a work of visual art" covers paintings, drawings, prints, sculptures and still photographic images produced for exhibition purposes only, existing in a single copy or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author. The Act specifically excludes motion pictures and other audiovisual work, as well as such

claim authorship of their work, or to prevent the use of their name as the author of a work which they did not create.¹⁶

This right also allows an artist to prevent the use of his or her name as the author of a work in the event the work is distorted, mutilated, or otherwise modified in such a way that would be prejudicial to the artist's reputation.¹⁶

The right of integrity allows the artist to prevent any intentional distortion, mutilation or other modification of the work that would be prejudicial to the artist's honor or reputation.¹⁷ It also allows the artist to prevent any intentional or grossly negligent destruction of a work of recognized quality.¹⁸

These rights vest only in the author of the work, and exist for the lifetime of the author.¹⁹ VARA also provides that these rights exist apart from any copyright in the work, and transfer of copyright will not affect the rights conferred by VARA.²⁰ The rights may not be transferred, but may be waived if the author expressly agrees to such a waiver in a signed written instrument.²¹

B. REMOVAL OF WORKS OF VISUAL ART FROM BUILDINGS

VARA amends section 113 of the Copyright Act to afford protection to artists whose works of art are incorporated into buildings.²² This section provides different prophylactic measures depending on whether the work of art can be removed without alteration or destruction.²³

If a work of art has been incorporated into a building in such a way that its removal would cause "destruction, distortion, mutilation or other modification"²⁴ of the work, then the rights

things as maps, charts, technical drawings and applied art. All merchandising, advertising and promotional items are also excluded. Any work made for hire or other work not subject to copyright is also excluded. See 17 U.S.C. § 101 (Supp. 1991).

15. See generally 17 U.S.C. § 106A(a) (Supp. 1991) (Rights of Attribution and Integrity).

16. 17 U.S.C. § 106A(a)(2) (Supp. 1991).

17. 17 U.S.C. § 106A(a)(3)(A) (Supp. 1991).

18. 17 U.S.C. § 106A(a)(3)(B) (Supp. 1991).

19. 17 U.S.C. §§ 106A(b) (Scope and Exercise of Rights) & 106A(d) (Duration of Rights) (Supp. 1991).

20. 17 U.S.C. § 106A(b) (Supp. 1991).

21. 17 U.S.C. § 106A(e) (Supp. 1991).

22. See generally 17 U.S.C. § 113(d) (Supp. 1991) (Removal of Works of Visual Art from Buildings).

23. *Id.*

24. Hereinafter, the word "alteration" will be used to encompass the cumbersome statutory language "destruction, distortion, mutilation or other modification."

of integrity and attribution will apply unless expressly waived by the artist.²⁵ The artist will be deemed to have waived the rights if he or she consented to the installation of the work before June 1, 1991, or executed a written waiver on or after June 1, 1991.²⁶ The written waiver must specify that the installation of the work may subject it to alteration by reason of its removal, and must be signed by both the artist and the building owner.²⁷

If the building owner wishes to remove a work of art that can be removed without alteration, the rights of integrity and attribution will apply unless the owner makes a diligent, good faith attempt, without success, to notify the artist of the intended action.²⁸ The artist will also lose his or her rights if the building owner successfully notifies the artist, but the artist fails within 90 days after receiving the notice either to remove the work or pay for its removal.²⁹ If the artist does pay for the removal of the work, title to that work will vest in the artist.³⁰

The following analysis will attempt to define further the rights and duties and real property owners under amended section 113. The analysis will focus on five areas: (1) consent and related contractual issues; (2) burdens of proof and setting a standard for determining whether a work of art can be removed without alteration; (3) the problem of works made for hire; (4) notification issues; and (5) possible problems posed by the doctrine of aesthetic nuisance.

III. FURTHER DEFINING RIGHTS AND DUTIES UNDER VARA

A. CONSENT AND RELATED CONTRACTUAL ISSUES

If an artist consents to have his work incorporated into a building in such a manner that its removal would cause

25. 17 U.S.C. § 113(d)(1)(A)-(B) (Supp. 1991).

26. 17 U.S.C. § 113(d)(1)(B) (Supp. 1991).

27. *Id.*

28. 17 U.S.C. § 113(d)(2)(A) (Supp. 1991). VARA provides that the Register of Copyrights shall establish a registry system whereby the artist of a work that has been incorporated into a building may record his or her identity and address with the Copyright Office. 17 U.S.C. § 113(d)(3). VARA further states that a building owner shall be presumed to have made a good faith attempt to notify if the owner sent notice to the artist's most recent address recorded with the Register. 17 U.S.C. § 113(d)(2)(B).

29. 17 U.S.C. § 113(d)(2)(B) (Supp. 1991).

30. *Id.*

alteration of the work, the artist's rights of integrity and attribution will not apply.³¹ Because VARA specifically requires a written instrument signed by both the artist and the property owner to effect consent,³² it is manifest that an oral consent shall not be binding. The statutory language also requires that the written consent specify that the installation of the work may subject it to alteration in the event of removal, not just that the work may be installed.³³ It is imperative that courts strictly scrutinize an apparent consent by the artist and must not imply consent by the artist in an ordinary contract to install a work of art in or on a building.

The precise scope of consent and its binding effect are somewhat ambiguous under VARA. The written consent is to be signed by both the artist and the property owner, implying that these are the only parties bound by the agreement. However, perhaps significantly, the statutory language preserving to the artist the rights of integrity and attribution does not specify that the artist may prevent only the *owner* of the work of art from destroying or altering it. Instead, VARA broadly provides that the "author of a work of visual art shall have the right . . . to prevent any intentional distortion, mutilation or other modification . . . [and] to prevent any destruction of a work of recognized stature"³⁴

This language implies that the artist may prevent *anyone* from harming his or her work. VARA provides that in the event of written consent, the rights of integrity and attribution "shall not apply."³⁵ Does this mean that if the artist consents to installation of a work in a building, he or she loses *all* rights in the work? If this is the case, parties other than the property owner may be free to alter or destroy the work. If Crimi had consented to installation of his work under VARA, the angry parishoners may have been free to paint over his fresco.³⁶ Presumably the property owner, as owner of the work of art, would have a cause of action against the harming third

31. See *supra* notes 24-26 and accompanying text.

32. See *supra* note 27 and accompanying text.

33. 17 U.S.C. § 113(d)(1)(B) (Supp. 1991) reads in pertinent part: "[the] written instrument [must specify] that installation of the work may subject the work to [alteration], by reason of its removal"

34. 17 U.S.C. § 106A(a) (Supp. 1991).

35. 17 U.S.C. § 113(d)(1)(B) (Supp. 1991).

36. See *supra* notes 1-4 and accompanying text.

party under common law notions of property law,³⁷ but if the owner declined to pursue a cause of action, the artist may be left without any personal legal redress. This ambiguity could be easily resolved by amending the section to read that if consent is given by the artist, the rights of integrity and attribution "shall not apply only as against all owners of the property and their successors in interest." This added clause would serve to limit the scope of the artist's consent to allow only the property owner and his or her successors in interest to alter the work of art, and preserve in the artist a cause of action against any tenant or other member of the public who destroys or alters the work.

Another ambiguity arises in subsections (d)(1)(B) and (d)(2) of section 113. Consent by the artist will waive all rights, but the statute does not specify that the rights will be waived only in the event of an *actual removal* of the work of art. This would seem to be the intended effect of the legislation,³⁸ but as worded, the statute would allow an owner who has received consent from an artist to freely alter the work of art even though the owner may never intend to remove it. Specifically, under subsection (d)(2), the owner of the building could wish to remove the work,³⁹ change his mind, and then be free to alter the work with impunity. By specifying that consent by the artist will only waive the artist's rights in the event of an *actual removal*, the statute would achieve its intended effect.

Limiting the scope of consent in the above manner would have several beneficial effects. If artists understand that their consent will have a limited effect, they will be more likely to give consent. Because consent will be more freely given by artists, more property owners may be encouraged to incorporate works of art into their buildings, and artists and the public as a whole will benefit.

37. The common law action of "trespass on the case" provides a damage remedy for indirect or consequential injury to real or personal property resulting from a wrongful act, intentional or negligent, of the defendant. See O. BROWDER, R. CUNNINGHAM, G. NELSON, W. STOEBUCK AND D. WHITMAN, *BASIC PROPERTY LAW* at 22, (5th ed. 1989). Actions may also be held under various state vandalism laws. See, e.g., CAL. PENAL CODE § 594 (West Supp. 1992) which provides in pertinent part: "Every person who maliciously (1) defaces with paint or any other liquid, (2) damages or (3) destroys any real or personal property not his own . . . is guilty of vandalism."

38. 17 U.S.C. § 113(d)(1)(B) (Supp. 1991) provides that the written instrument effecting consent must specify that installation of the work may subject it to alteration "by reason of its removal" (emphasis added). Section 113(d)(2) begins "[i]f the owner of a building wishes to remove a work of visual art . . ." (emphasis added).

39. See *supra* note 38.

B. BURDENS OF PROOF

1. *The Problem*

In an ideal situation, the artist and the property owner would sit down at the bargaining table dealing at arms length, each fully informed and each in an equal position of bargaining power. Unfortunately, this idyllic scene is not reality. The reality is that few artists and property owners will be aware of VARA and the various protections it offers. Because of this reality, one can easily imagine the following scenario taking place:

A property owner owns a building into which a work of art has been incorporated. The property owner is losing money on the building, and wants to tear it down in order to make more efficient use of the land. In the course of destroying the building, the work of art is also destroyed without the artist being notified. The artist finds out that the work has been destroyed, and seeks the advice of an attorney. The attorney conducts the necessary research, and informs the artist of the rights under VARA. An action is brought with the artist claiming that the work of art could not have been removed without destroying the work, and since the property owner did not get a written consent from the artist, the artist's rights of integrity were still in force and therefore, the property owner is liable for damages.⁴⁰ The property owner will claim that the work of art could have been removed without destruction, and since the artist did not register with the Registry and therefore could not be located, the artist is not entitled to damages. But because the artwork has been destroyed, it is impossible to determine whether the work of art could have been removed without alteration, so whomever has the burden of proof on that issue will lose. Unfortunately, VARA is silent with respect to burdens of proof.

To place the entire burden of proof on either party in the above situation would seem inequitable. If the artist must prove that the work of art could not be removed without alteration, the artist would rarely be able to maintain a cause of action.⁴¹ On the other hand, if the property owner had to

40. 17 U.S.C. § 501(a) provides for remedies and damages co-extensive with that of copyright under Title 17, except there will be no criminal offenses under VARA as under 17 U.S.C. § 506.

41. See *infra* notes 42-43 and accompanying text.

prove that the work of art could be removed, the property owner would rarely be able to maintain a defense to an artist's cause of action. Instead, a practical standard is needed for determining whether a work of art can be removed from a building without alteration.

2. *A Standard For Determining Whether a Work of Art Can Be Removed Without Destruction*

With today's modern painting techniques, experts in the field believe most works of art can be removed without harm,⁴² but in some cases the cost may be prohibitive.⁴³ If a work could be removed, but only with considerable expense, then it may be said that the work *can* be removed without alteration and the artist would lose his or her rights if the property owner is unable to locate him or her in good faith. If the artist is notified, he or she will likely be unable to afford the cost of removing the work without destroying it. On the other hand, there are certain works of art that will clearly be unremovable without alteration,⁴⁴ and to prevent the property owner from tearing down a building just because a work of art is incorporated into the building is equally unfair.

42. See Gantz, *Protecting Artists' Moral Rights: A Critique of the California Art Preservation Act as a Model for Statutory Reform*, 49 GEO. WASH. L. REV. 873, 885 n.81 (1981). Most modern murals are made from water-base paints which roll off easily, and thus could be removed without harm to the work. Older techniques used oil-base paints on wet or dry plaster. *Id.* (citing an interview with art historian Carl Baldwin, New York City (Nov. 1979)).

43. See Karlen, *Moral Rights in California*, 19 S.D.L.REV. 675, 717 (1982). In discussing the California Art Preservation Act, which contains a provision similar to VARA § 604, Karlen says: "In many instances, if the owner expended a fortune in hiring experts and workmen to delicately remove works of art which were difficult to excise, then it would be said that the owner *could* remove without substantial damage." *Id.* (emphasis in original).

44. See, e.g., *Crimi*, 89 N.Y.S.2d at 814. The method of fresco painting was described by Crimi as follows:

Fresco painting is done on wet plaster. The color adheres to the plaster through chemical action—the union of carbonic acid gas and lime oxide producing carbonate of lime as the water evaporates on the surface of the plaster. In fresco, no binding agent need be mixed with the pigment as in other painting processes; the pigments are simply well ground in water and applied to the wet surface. As the plaster dries, the color is actually incorporated in the plaster and—if the work is properly executed—the painting is assured a permanence surpassing that achieved in any other method of wall decoration. *Id.*

To rectify this problem, courts must imply a reasonable cost requirement when interpreting these provisions.⁴⁵ The cost to remove a work should not be limited to the mere expense involved in removing it, but should also allow consideration of other factors. In determining whether the cost to remove a work of art without destroying it is reasonable, courts should examine two important factors: (1) the importance of the property owner's intended action affecting the work of art; and (2) the value of the work of art in relation to the value of the property and the expense required to remove the work. If this standard is applied faithfully, allocating the burden of proof can be done with less harsh results.

The artist would make a *prima facie* case of a violation of rights under VARA merely by proving that the work has been altered. The property owner can then defend by showing that the importance of the action that caused the work to be destroyed outweighed the value of the work of art. Destruction of a building because of substantial monetary loss, neighborhood revitalization, or condemnation would be actions that would be deemed important. The case would then fall under sub-section (d)(2) and the property owner would only have to prove he or she made a good faith attempt to notify the artist without success, or that the artist was notified, and failed to remove the work within 90 days. Presumably, if the property owner wished to remove the work merely because he or she found it distasteful, the property owner's action affecting the work would not be deemed important. The case would then fall under sub-section (d)(1), and the property owner would be liable for damages unless he or she was able to obtain a written consent from the artist.

If a reasonable cost requirement is applied, it should further clarify the intent of the legislature that these two sections be mutually exclusive. Allocating a burden of proof can be done without harsh results, more artwork can be preserved for the community, and property owners will not be prevented from taking necessary actions with their property.

45. See Petrovich, *Artists' Statutory Droit Moral in California: A Critical Appraisal*, 15 LOY. L.A.L. REV. 29 (1981) for a similiar suggestion in interpreting The California Art Preservation Act.

C. WORKS MADE FOR HIRE

Significantly, “works made for hire”⁴⁶ are excluded from protection under VARA. Because many works of art incorporated in buildings may be specially ordered or commissioned, this exclusion may seem to create a large loophole in VARA: VARA purports to protect works of art incorporated into buildings, but if such a work is found to be a “work made for hire,” it will lose protection.

A recent unanimous decision by the Supreme Court resolved the conflict in lower courts⁴⁷ over the proper construction of the “work made for hire” provision of the Revised Copyright Act. In *Community Center for Non-Violence v. Reid*,⁴⁸ the Court clarified the standard for determining whether a work qualifies as a “work made for hire.” The Court first stated that Congress intended to provide two mutually exclusive ways for a work to qualify as a “work made for hire”: one for employees working in the scope of employment and the other for specially ordered or commissioned works created by independent contractors.⁴⁹ The Court then stated that since nine specific classes of works were enumerated in the second clause of the “work made for hire” definition,⁵⁰ only those classes of works could qualify as a “work

46. See 17 U.S.C. § 101 (Supp. 1990) which provides in pertinent part:

A ‘work made for hire’ is—

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. . . .

Id.

47. The Second, Fourth and Seventh Circuits had adopted variations of an “actual control” test to determine whether a party is an employee for the purposes of the “work made for hire” provision. See, e.g., *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984); *Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*, 810 F.2d 410 (4th Cir. 1987); *Evans Newton, Inc. v. Chicago Sys. Software*, 793 F.2d 889 (7th Cir.), *cert. denied*, 479 U.S. 949 (1986). The Fifth Circuit had applied a common law agency test, see, e.g., *Easter Seal Soc’y v. Playboy Enter.*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988). Finally, the Ninth Circuit had ruled that only formal salaried employees met the definition. *Dumas v. Gommerman*, 865 F.2d 1093 (9th Cir. 1989).

48. 490 U.S. 730 (1989).

49. *Id.* at 747-8.

50. See *supra* note 46.

made for hire” if created by an independent contractor.⁵¹ The Court held that courts shall apply the common law of agency to determine whether an author of a work was an employee or an independent contractor.⁵² In applying the common law of agency test, the Court analyzed a number of factors including: the hiring party’s right to control the project; the skill required of the free-lancer; the source of the tools used to create the work; the location where the work was done; the duration of the relationship between the parties; the hiring party’s right to assign additional projects; and the method of payment.⁵³

Few artists creating works to be incorporated into buildings will be working as an employee of the building owner, rather, most will be working as independent contractors. Therefore, they will only lose protection under VARA if their work falls into one of the nine specific classes and the parties have signed a written instrument specifying that the work is a “work made for hire.”⁵⁴ It is very unlikely an artist’s work will fall into any of the nine specified classes.⁵⁵ Effectively then, the only way such a work may lose protection is upon a court finding that the artist was an employee of the property owner (or any other party directing control over the artist). This is also unlikely, as illustrated by the *Reid* case.⁵⁶

51. *Reid*, 490 U.S. at 748.

52. *Id.* at 751.

53. *Id.* at 751. The Court also considered the extent of the hired party’s discretion over when and how long to work, the hired party’s role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, whether the hiring party is in business, the provision of employee benefits and the tax treatment of the hired party. *Id.* at 751-52.

54. *See supra* note 46.

55. The nine specified classes are: (1) a contribution to a collective work; (2) a part of a motion picture or other audiovisual work; (3) a translation; (4) a supplementary work; (5) a compilation; (6) an instructional text; (7) a test; (8) answer material for a test; and (9) an atlas. 17 U.S.C. § 101 (1986). A “collective work” is defined as “a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.” *Id.* A compilation is defined as “a work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” *Id.* The term “compilation” includes collective works. *Id.* A “supplementary work” is defined as “a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work. . . .” *Id.*

56 In that case, a sculptor, James Reid, was hired to sculpt a nativity scene, with a homeless family as the subject, for CCNV. *Reid*, 490 U.S. at 730. In analyzing Reid’s status in this relationship, the Court applied the agency test in the following manner: CCNV asserted control over the project; Reid was practicing a skilled occupation using his own tools; Reid did the work in his own studio; Reid was hired

Although the Court in *Reid* decided the work for hire issue, they remanded the case to the district court to decide whether Reid's sculpture could be considered a work of joint authorship.⁵⁷ The case was settled before the district court passed on the issue.⁵⁸

VARA provides that in the case of a joint work prepared by two or more authors, any one of the authors may waive all rights for all authors.⁵⁹ This is significant because all joint authors may not agree on whether to waive rights and if an artist and a property owner were found to be joint authors, their interests may be in opposition.

The Copyright Act defines a joint work as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."⁶⁰ One commentator describes the terms "inseparable" and "interdependent" as follows:

[I]f author B's contribution, when combined with author A's contribution results in recasting, transforming or adapting A's contribution, then the two contributions may be said to be inseparable. If the process is simply one of assembling into a collective whole A's and B's respective contributions, without thereby recasting A's contribution, then the two contributions may be said to be interdependent.⁶¹

only for this one project; CCNV had no rights to assign additional projects; Reid was retained for two months; and payment was conditioned on completion of the statue. *Id.* at 752-53. In analyzing the rest of the factors, *see supra* note 53, the Court found apart from the deadline, Reid had absolute freedom in deciding when and how long to work, Reid had total discretion in hiring and paying assistants, creating sculptures was hardly a regular business for CCNV, in fact CCNV was not a business at all, and finally, CCNV did not pay payroll or Social Security taxes, provide any employee benefits, or contribute to unemployment insurance or workers' compensation funds. *Id.* at 753. Weighing these factors, the Court concluded that all of them, except the assertion of control by CCNV, weighed "heavily against finding an employee relationship," and Reid could not be considered an employee of CCNV. *Id.*

57. *Id.* at 753.

58. Interview with Thomas Goetzl, Professor of Law at Golden Gate University School of Law, in San Francisco (Apr. 1991).

59. 17 U.S.C. § 106A(e) (Supp. 1991) (Transfer and Waiver).

60. 17 U.S.C. § 101 (Supp. 1991).

61. 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 6.04 at 6-11 (1989).

It is clear that if an artist wants to preserve his or her rights, the artist must be careful not to allow the property owner to assert too much control over the work. This will rarely be an issue. Realistically, a property owner will rarely assert any control over the project, let alone enough to transform the work into a "joint work." To avoid having an artist's creation become a "work made for hire," the artist should, if possible, work in his or her own studio. The contract to create the work should specify that payment will be made upon completion of the work, and if the property owner wants the artist to create several works, each work should be covered by a separate contract. In addition, the artist should read the contract carefully and should not sign any contract that specifies that the work will be treated as a "work made for hire" unless that is the artist's intent. To prevent a work from becoming a "joint work," the artist must simply preserve artistic control over the project in the contract.

D. NOTIFICATION OF THE ARTIST

Under section 113(d)(2), if a work of art can be removed from a building without harm, the artist's rights will apply unless the property owner has made a good faith attempt, without success to notify the artist, or has notified the artist and the artist failed within ninety days to remove the work or pay for its removal.⁶² Artists should be encouraged to record their identity and address with the Register of Copyrights as provided in VARA. This will allow the artist to be notified easily in case the property owner wishes to remove the work, and will allow the artist to preserve the work if he or she so desires.

Assume, however, that an artist has not registered his or her name and address, and cannot be located by the property owner, or that after being notified, the artist declines to remove the work. In these cases, the property owner is free to dispose of the work in any manner. VARA assumes that the artist's interest in preserving the work is the only interest at work in this situation. This may not be the case. The public as a whole, as well as many art or landmark preservation groups also have a strong interest in seeing works of art preserved for the community.⁶³

62. 17 U.S.C. § 113(d)(2)(A)-(B) (Supp. 1991).

63. See, e.g., Cal. Civ. Code § 989(a) (West Supp. 1992) where the legislature finds and declares that "there is a public interest in preserving the integrity of cultural and artistic creations."

With these interests in mind, VARA should be amended to allow public or private non-profit organizations an opportunity to pay for the removal and preservation of a work incorporated in a building if the artist cannot be notified, or if the artist after receiving notice, fails to remove the work.⁶⁴ In either of these two situations, assuming a property owner desires to remove the work of art in such a manner that it will be destroyed, the property owner, before taking such action, should be required to publish notice of the intended action in a public newspaper. Any organization wishing to preserve the work of art would then be required to notify the property owner of its intentions, and would be allowed a period of ninety days after the publication date during which to pay for the removal of the work. If the organization should fail within ninety days to remove the work, the property owner would then be allowed to remove the work in any manner desired. If an organization agrees to remove the work, and pays for its removal, title to the

64. This proposal is modelled on Cal. Civ. Code § 989 (West Supp. 1992)(Preservation of Cultural and Artistic Creations). That section reads in pertinent part:

(e) Removal from Real property. (1) If a work of fine art cannot be removed from real property without substantial physical defacement . . . no action . . . may be brought under this section. However, if an organization offers some evidence giving rise to a reasonable likelihood that a work of art can be removed . . . without substantial physical defacement . . . and is prepared to pay the cost of removal of the work, it may bring a legal action for determination of this issue. In that action, the organization shall be entitled to injunctive relief to preserve the integrity of the work of fine art, but shall also have the burden of proof. . . .

(2) If the owner of the real property wishes to remove a work of fine art which is part of the real property, but which can be removed from the real property without substantial harm to such fine art, and in the course of or after removal, the owner intends to cause or allow the fine art to suffer from physical defacement . . . the owner shall do the following:

(A) If the artist . . . fails to take action to remove the work of fine art after [being notified], the owner shall provide 30 days' notice of his or her intended action affecting the work of art. The written notice shall be a display advertisement in a newspaper of general circulation in the area where the fine art is located

(i) If within the 30-day period an organization agrees to remove the work of art and pay the cost of removal of the work, the payment and removal shall occur within 90 days of the first day of the 30-day notice.

(ii) If the work is removed at the expense of an organization, title to the fine art shall pass to that organization.

(iii) If an organization does not agree to remove the work of fine art within the 30-day period or fails to remove and pay the cost of removal of the work of fine art within the 90-day period the owner may take the intended action affecting the work of fine art.

work would pass to the organization. The organization should then be required to preserve the work of art for the community, either by displaying the work itself, or by donating the work to a museum, preferably one in the same area that the work of art was originally located.

This amendment would fully recognize all the interests at work in this situation. The property owner would still be allowed to remove the work if no one agreed to pay for its removal, and one can hardly imagine that the property owner has any preference as to whether an artist or a non-profit organization actually pays to remove the work. The owner would still be able to rely on a ninety day period to remove a work. If the artist fails to remove, either because the artist cannot afford to pay the removal costs, because the artist no longer has any interest in preserving the work, or because the artist simply cannot be located, instead of automatic destruction of the work, there is a chance that it may be preserved for the public.

E. THE POSSIBLE PROBLEM OF AESTHETIC NUISANCE

Courts display a decided reluctance to recognize nuisance actions based on notions of aesthetics.⁶⁵ Courts have been reluctant to delve into this area, usually reasoning that there are no objective standards by which to judge matters of taste⁶⁶ or that an unaesthetic use of land does not constitute a substantial invasion of interests in surrounding property owners in the use and enjoyment of their land.⁶⁷ There are,

65. See generally Coletta, *The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes*, 48 Ohio St. L.J. 141 (1987) for an excellent analysis of the doctrine in general as well as an analysis of how the doctrine has traditionally been interpreted by courts.

66. See, e.g., *Ness v. Albert*, 665 S.W.2d 1 (Mo. App. 1983). "Aesthetic considerations are fraught with subjectivity. One man's pleasure may be another man's perturbation, and vice versa. What is aesthetically pleasing to one may totally displease another- 'beauty is in the eye of the beholder.' Judicial forage into such an area would be chaotic. . . . This court has no inclination to knowingly infuse the law with such rampant uncertainty." *Id.* at 2. Cf. *Clary v. Borough of Eatontown*, 124 A.2d 54 (N.J. App. Div. 1956), where the court upheld larger lot-size zoning requirements in a predominantly low-income municipality. The court stated "[i]t is no longer to be doubted that [community attractiveness] is an appropriate consideration within the statutory criterion of the 'general welfare.'" *Id.* at 64.

67. See, e.g., *B & W Management, Inc. v. Tasea Investment Co.*, 451 A.2d 879 (D.C. App. 1982). In an action by B & W to enjoin a nearby landowner from operating a surface parking lot alleging the lot constituted a private nuisance because it damaged the aesthetics of the neighborhood, the court disposed of the claim in one sentence: "B & W's claim for damage to 'the aesthetics of the area' based on neighborhood 'blight' does not amount to an assertion of the substantial interference with B & W's use and enjoyment of its land required to sustain a private nuisance action." *Id.* at 883.

however, several recent decisions that indicate a possible change in attitude toward this doctrine.⁶⁸

The few cases that have upheld actions for aesthetic nuisance have done so for such things as keeping wrecked automobiles on a private lot,⁶⁹ and an unsightly accumulation of debris.⁷⁰ Whether an offensive or unsightly work of art placed on, or incorporated in, a building could ever rise to the level of aesthetic nuisance is questionable at best, but given the recent decisions upholding use of the doctrine,⁷¹ one cannot rule out the possibility. It is certainly feasible, under traditional nuisance law, that the wall of a building on which a work of art was placed could deteriorate to such a point that it posed a danger to passers-by.⁷²

Whether an action in such a situation is based on notions of aesthetic or traditional nuisance, the success of such an action would place the property owner in a bizarre Catch-22 under VARA. Assume a successful nuisance action is brought against a property owner in which the court requires the owner to tear down or repair the offending or dilapidated work. Assume also that the artist that created the work had not signed a written consent, and the artist's rights of integrity were still in force. It may be difficult for the property owner to remove the work, or repair the building, in such a way that the work was altered or modified without violating the artist's right of integrity. Significantly, however, VARA provides that the modification of a work which is the result of conservation

68. See, e.g., *Hay v. Stevens*, 530 P.2d 37 (Or. Sup. Ct. 1975), where the plaintiffs asked the court to determine that a fence erected by their neighbors between the plaintiff's property and a beach constituted a nuisance because of its unsightliness. The court observed in dictum "[a]lthough there is authority to the contrary, we begin with the assumption that in the appropriate case recovery will be permitted under the law of nuisance for an interference with visual aesthetic sensibilities." *Id.* at 39. See also *Foley v. Harris*, 286 S.E.2d 186 (Va. Sup. Ct. 1982), where the Virginia Supreme Court upheld a chancellor's decree enjoining defendants from keeping wrecked automobiles on their lot, accepting the chancellor's notion that unsightliness alone can form the basis of a nuisance action. *Id.* at 190-91; *Allison v. Smith*, 695 P.2d 791 (Colo. App. 1984), holding that a legitimate but unsightly activity may constitute a private nuisance. *Id.* at 794.

69. *Foley*, supra note 67.

70. *Allison*, supra note 67.

71. See supra note 67.

72. But see 17 U.S.C. § 106A(c)(1) (Supp. 1991) (Exceptions) which provides that the modification of a work of art that is the result of passage of time or the inherent nature of the materials is not an alteration, and therefore, not a violation of the artist's rights conferred by the Act.

is not a violation of the artist's rights, unless the modification is caused by gross negligence.⁷³ Presumably then, a property owner could repair a dilapidated building in such a way that the artwork is also restored without violating any rights of the artist.

It is clear then, that in the event of a successful nuisance action against the property owner requiring the owner to take action that would violate an artist's rights under the Act, that the artist must be required to waive his rights. The property owner should, however, make every effort to preserve the work, or should attempt to notify the artist and allow the artist the opportunity to preserve the work.

IV. CONCLUSION

The Visual Artists Rights Act of 1990 presents an admirable effort on the part of Congress to fashion moral rights for artists on a federal level. The specific provision covering works of art incorporated in buildings is an equally laudable attempt to deal with the interests of artists and property owners that often come into conflict. Because VARA is still in its seminal stages, it is impossible to predict how courts will interpret its various provisions, and harder still to predict how effectively VARA will address the often competing interests of property owners and artists.

The provision of VARA covering works of art incorporated in buildings as it currently reads does not completely address all possible issues that may arise. If the interpretations suggested in this article are followed by courts, VARA will more effectively achieve its purpose. Congress must pay close attention to how courts are interpreting VARA, and appropriate amendments must be made in the event that VARA is not being applied as envisioned. If this is done, artists in the United States may finally receive the much needed rights they deserve without impinging on the equally important rights of property owners.

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73. 17 U.S.C. § 106A(c)(2) (Supp 1991).

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