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How important are the visual arts in our society? I feel strongly that the visual arts are of vast and incalculable importance. Of course, I could be prejudiced. I am a visual art.

—Kermit the Frog, Muppet

There are three forms of visual art: painting is art to look at, sculpture is art you can walk around, and architecture is art you can walk through.

—Dan Rice, Artist

I. INTRODUCTION

Roslyn Mazzilli’s “There” is a sculpture located in the Oakland City Center, where people gather daily to eat lunch and talk. Few of these people likely understand the

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4. Id. The Oakland City Center, located in downtown Oakland, serves over 50,000 people. Oakland City Center, Visitors, http://www.oaklandcitycenter.com/visitors.html (last visited Apr. 3, 2007). Its proximity to the downtown business district, county and city offices, and city hall make it a prime location for visitors. See id. With a plethora of stores and restaurants, it is a popular spot for lunchtime dining and shopping. Id. The
emotions that the sculpture is intended to evoke, or the inspiration behind its creation.\textsuperscript{5} Perhaps more importantly, they do not have to. The beauty of art is that it crosses all boundaries and levels of education, socioeconomic statuses, and cultural backgrounds. It provides something that every man, woman, and child can appreciate in their own individual way.

But what if "There" was destroyed? What if it was cut into a number of pieces and displayed in multiple locations? Should the artist be denied protection for her work simply because it had already been sold to the City of Oakland, or should she be entitled to some form of protection based on the art being her work?

The American legal system places a lower value on the works of visual artists than foreign legal systems by failing to provide protection for the moral rights of all artists.\textsuperscript{6} In 1988, the United States finally joined the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention),\textsuperscript{7} which was initially drafted to expand copyright protection beyond the nation where the copyright was granted.\textsuperscript{8} While the United States joined with a few

\textsuperscript{5} See Mazzilli, supra note 3 ("I try to evoke an appropriateness of scale, and a life-affirming emotional response. For example, my sculpture 'There' in the city center of downtown Oakland in California answered the criticism by writer Gertrude Stein who said 'there is no there, there.' . . . My sculptures are inspired by nature, by her images and endless palette of color. Like natural forms, my sculptures are rhythmically alive, gracefully poised, and seemingly kinetic: like the moment a bird spreads its wings into flight, like petals of a flower fanned to form a blossom.").

\textsuperscript{6} See infra Part IV.C. Moral rights historically protected an artist's work from being destroyed or mutilated, or altered in any way. See infra Part II.A.1. The term "moral rights" refers to the inherent right of an artist to protect the integrity of his work. Id. For a full definition of moral rights in current United States legislation, see infra Part II.C.


limitations, the Berne Convention brought the United States closer to complying with the international standards of protection for artists. Prior to the United States’ signing of this treaty, artists generally had no recourse with respect to the fate of their work after it was sold, as copyright laws protected the work only from economic exploitation.

Following the implementation of the Berne Convention, the United States passed its own legislation dealing with moral rights, the Visual Artists Rights Act of 1990 (VARA). While facially inclusive of the moral rights of visual artists, the legislation has not proven effective in actually protecting them. American case law demonstrates how little weight has been given to VARA, and proves that there are still many aspects of moral rights that it does not protect. By looking at international moral rights legislation as a guide, America can amend VARA to bring it into full compliance with the Berne Convention and international standards, thus allowing more complete moral rights protection for American artists.

This comment will first provide a background of the protection of visual artists by analyzing the Berne Convention. The comment will then outline America’s moral rights legislation, as codified by VARA. Part III will

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10. See infra Parts IV.C-E.
11. Linda J. Lacey, Of Bread and Roses and Copyright, 1989 DUKE L.J. 1532, 1539 (1989). In contrast to this American theory of protecting works only from economic poaching, the moral rights theory, as it originated in Europe, protects an artist's personal rights in his or her property. Id. at 1548-49. Moral rights remain with an artist even after their work is sold. Id. The droits moraux, or moral rights, which originated in France, stands for the proposition that artistic creations are part of the artist's personality, and that status as personal property gives rise to the need for a higher level of protection of the property than mere economic remedies. Id. For more on this theoretical dichotomy, see infra Part IV.D.
12. See Berne Convention Implementation Act § 3.
14. See infra Part IV.A.
15. See infra Part IV.A.
16. See infra Part V.
17. See infra Part II.A.
18. See infra Part II.C.
identify the legal problem with the current VARA statute.\textsuperscript{19} A discussion of case law in Part IV will demonstrate the inadequate protection given to the moral rights of artists, and the difference between American copyright and moral rights legislation as compared to the international community.\textsuperscript{20} Finally, Part V will propose a better standard for America to use in defining and protecting the moral rights of artists, using international moral rights legislation as a guide.\textsuperscript{21}

II. BACKGROUND

A. The Berne Convention

In 1988, the United States joined the Berne Convention\textsuperscript{22} when President Reagan signed the Berne Convention Implementation Act (BCIA) into law.\textsuperscript{23} The United States' decision to finally join the Berne Convention based largely on international copyright issues,\textsuperscript{24} including the desire to fight copyright piracy abroad and increase the international copyright protection afforded to American copyright holders.\textsuperscript{25}

1. Article 6 bis

Article 6 bis of the Berne convention provides moral rights protection to the author of any literary or artistic work.\textsuperscript{26} Specifically, Article 6 bis provides that "the author

\textsuperscript{19. See infra Part III.}
\textsuperscript{20. See infra Part IV.}
\textsuperscript{21. See infra Part V.}
\textsuperscript{23. Id.; see also David M. Spector, Implications of United States Adherence to the Berne Convention, 17 AIPLA Q.J. 100, 102 (1989).}
\textsuperscript{24. Spector, supra note 23, at 105-06.}
\textsuperscript{25. See id. The main purpose of the Berne Convention was to extend the protection of copyrighted materials beyond the country where the copyright was issued. See generally Berne Convention, supra note 7, at art. 1. Prior to this treaty, a British author who registered the copyright for his book in England would be able to prevent that work from being copied within England, but it could freely be copied in other countries, such as France, without any recourse. The European community decided to address this situation, and wrote the Berne Convention to act as the instrument of enforcement. The United States finally decided to join the Berne Convention when it became apparent that American artists were being subjected to this dichotomy without adequate protection abroad. See infra Part II.A-B.}
\textsuperscript{26. Berne Convention, supra note 7, at art. 6 bis(1).}
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 said work which will be prejudicial to his reputation." The article further states that these rights shall continue after the death of the author for the remaining period of copyright protection, depending on the country where protection was granted.

Article 6 bis was originally written to codify the moral rights protection given to artists in the international community, but it represents only a minimalist approach to granting that protection. Historically, moral rights legislation protected not only the rights of attribution and integrity, as covered by Article 6 bis, but also the divulgation right and the right to repent or withdraw. Although the rights of divulgation and withdrawal are not included in the Berne Convention, they are protected by many countries.

At the time of the BCIA, the United States did not have any moral rights protection as required by Article 6 bis. Despite this lack of express moral rights legislation, Congress stressed that U. S. law already complied with Article 6 bis through various provisions of existing state and federal laws. The legislators stated that the United States should not be required to follow Article 6 bis precisely as outlined in the Berne Convention because of existing laws that addressed

27. Id.
28. Id. at art. 6 bis(2).
30. See infra Part II.C.1.
31. See Dietz, supra note 29, at 204. The divulgation right reserves in the author the sole decision of when, how and where to release his work to the public. See infra Part IV.E.
32. See Dietz, supra note 29, at 204. The right to repent or withdraw allows the author to withdraw his work from the public sphere whenever he or she chooses. See infra Part IV.E.
33. Dietz, supra note 29, at 203.
34. See infra Part II.B.
35. S. REP. NO. 100-352, at 9 (1988), as reprinted in 1988 U.S.C.C.A.N. 3706, 3714-15 ("This existing U.S. law includes various provisions of the Copyright Act and Lanham Act, various state statutes, and common law principles such as libel, defamation, misrepresentation, and unfair competition, which have been applied by courts to redress authors' invocation of the right to claim authorship or the right to object to distortion."); see also 134 CONG. REC. S14553 (daily ed. Oct. 5, 1988) (statement of Sen. DeConcini).
moral rights issues in the United States.\textsuperscript{36} Despite claims that protection for moral rights already existed,\textsuperscript{37} others in Congress argued that the existing laws were in fact inadequate.\textsuperscript{38} Nevertheless, Congress determined that the available laws provided just enough protection to enable the United States to comply with the Berne Convention without implementing Article 6 bis.\textsuperscript{39}

\textit{a. The Lanham Act}

United States lawmakers cited section 43(a) of the Lanham Act\textsuperscript{40} as one example of the protection given to moral rights under American law.\textsuperscript{41} Section 43(a) was enacted to codify the common law trademark doctrine of "passing off," the representation of one person's goods or works as those of another.\textsuperscript{42} The Lanham Act was meant to protect both producers and consumers,\textsuperscript{43} yet the courts' interpretation of it

\textsuperscript{36} H.R. REP. NO. 100-609, at 38-39 (1988). The Committee on the Judiciary of the House of Representatives stated that: "[E]xisting law is sufficient to enable the United States to adhere to the Berne Convention, the implementing legislation is completely neutral on the issue of whether and how protection of the rights of paternity and integrity should develop in the future." \textit{Id.}

\textsuperscript{37} \textit{See id.}

\textsuperscript{38} 134 CONG. REC. S14558 (daily ed. Oct. 5, 1988) (statement of Sen. Hatch). The Senator stated: "While existing U.S. law satisfies U.S. obligations under article 6 bis of Berne, our judicial system has constantly rejected causes of action denominated as 'moral rights' or arising under the moral rights doctrine." \textit{Id.} The Senator's statement clearly shows that the United States did not in fact have any moral rights protection, but that there was enough generalized protection for the United States to comply with the Berne Convention without complying with Article 6 bis. \textit{See id.}

\textsuperscript{39} \textit{See} 134 CONG. REC. S14553 (daily ed. Oct. 5, 1988) (statement of Sen. DeConcini). Even though Congress stated that the current law was sufficient for compliance with the Berne Convention, the United States refused to join the Berne Convention until it was assured that Article 6 bis would not be enforced against a member nation which did not fully implement it. \textit{Id.} This requirement can be seen as an implied admission that Congress knew the current laws were not sufficient.


\textsuperscript{41} \textit{See supra} note 36. The Lanham Act was one of the existing American laws used by legislators to show there was no need to implement Article 6 bis. \textit{See supra} text accompanying notes 40-53.


\textsuperscript{43} \textit{See} Freedman, \textit{supra} note 42, at 307.
led to the conclusion that the Lanham Act could function as "the one federal enactment capable of safeguarding the right of attribution." 44

In Gilliam v. American Broadcasting Companies, 45 the Second Circuit firmly recognized an artist's right to integrity in his or her work through a Lanham Act analysis. 46 The plaintiffs were ultimately successful with their cause of action under the Lanham Act, allowing the court to protect the work in question, a television series. 47 Although the Lanham Act is a trademark statute, it was "invoked to prevent misrepresentations that may injure plaintiff's business or personal reputation, even where no registered trademark is concerned." 48 The court reasoned that when a plaintiff alleges that the defendant has presented a distorted version of his or her work to the public, he or she actually seeks "to redress the very rights sought to be protected under the Lanham Act." 49 The holding of this case likely caused Congress to believe that the Lanham Act protected the moral rights of artists, which led to the suggestion that America was in compliance with the Berne Convention.

Years later, the Supreme Court distinctly rejected the idea that the Lanham Act provides moral rights protection. In Dastar Corp. v. Twentieth Century Fox Film Corp., 50 the Court clarified that the Lanham Act does not provide protection for the right of attribution, 51 which includes the right of an artist to claim authorship of his or her work, among other rights. 52 This decision raises the question of

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45. Gilliam v. Am. Broad. Cos., 538 F.2d 14 (2d Cir. 1976); see also infra Part II.B.
46. See Gilliam, 538 F.2d at 24-26.
47. Id. at 24-25.
48. Id. at 24.
49. Id. at 24-25.
51. Id. at 33 (clarifying that once a copyright expires, the right to copy is with the public). See generally Stacey L. Garrett, No Need to Search the Nile: The Supreme Court Clarifies the Use of Public Domain Works in Dastar v. Twentieth Century Fox, 2003 U. ILL. J.L. TECH. & POLY 573, 577 (2003) (explaining that the essence of the Dastar opinion is that public domain materials may be used without attribution).
52. See infra notes 76-78 and accompanying text.
whether the United States was ever compliant with the Berne Convention, since Congress cited the Lanham Act as an example of the protection afforded moral rights at the time of the BCIA.\(^5\)

**B. Moral Rights Protection in the United States Before VARA**

Contrary to the statements made by Congress,\(^5\) courts have historically been reluctant to protect artists' moral rights in the United States, based largely on the historically utilitarian view that copyrights only protect economic interests.\(^5\) Until VARA was passed in 1990, there was no real legal protection for the moral rights of artists. Thus, artists attempted to use various causes of action—defamation, unfair competition, breach of contract, and violations of the Lanham Act—in an effort to recover damages for the destruction or mutilation of their work.\(^5\) Artists have often turned to other causes of action based in copyright law, but when an artist has not obtained a registered copyright in his or her work, it becomes more difficult to succeed at trial.\(^5\)

Case law demonstrates the lack of protection artists were given in the United States prior to the implementation of

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53. See Supreme Court Rules that Distributor of Video of Edited Version of Public Domain Television Series Did Not Violate Lanham Act by Failing to Credit Twentieth Century Fox as Series’ Creator, ENT. L. REP., June 2003, at 1 (suggesting that the United States may be in violation of the Berne Convention following the Dastar decision).

54. See supra note 35.

55. See infra Part IV.C.

56. Timothy M. Casey, Note, The Visual Artists Rights Act, 14 HASTINGS COMM. & ENT. L.J. 85, 91-95 (1991). Artists who believe their claim will fail under VARA pursue causes of action drawn from various sources, including other copyright causes of action, state causes of action, and causes of action found in other intellectual property areas, like trademark law, to pursue their claims. Id. Copyright law only provides economic remedies, and does not in itself protect moral rights. Id. at 91. Other areas of law may each provide a remedy for a particular portion of an artist’s loss, but no legal theory in and of itself protects an artist’s moral rights. Id. at 91-95.

57. See id.

58. An artist obtains a copyright in a work as soon as the work is created and fixed in a tangible form. 17 U.S.C. § 102 (2000). Under the current copyright laws in the United States, the copyright is automatic. See 17 U.S.C. §§ 409-412 (describing the method for obtaining copyright registration, and the remedies which cannot be collected from an infringer unless the copyright has been registered). However, an artist may not sue under a theory of copyright violation unless he or she has registered the copyright with the Copyright Office. See id.
VARA. In 1947, the Seventh Circuit heard *Vargas v. Esquire*, a case involving an artist’s claim that a magazine used his drawings without his permission in violation of his moral rights. The court rejected the artist’s claim that his art was protected under U. S. law, stating: “What plaintiff in reality seeks is a change in the law in this country to conform to that of certain other countries. We need not stop to inquire whether such a change, if desirable, is a matter for the legislative or judicial branch of the government.”

Two years later, in *Crimi v. Rutgers Presbyterian Church*, a New York court held that an artist had no recourse against a church that painted over the plaintiff’s artwork, finding that once a work is sold, it is unconditionally the property of the purchaser. The court used this reasoning to deny any protection to the artist.

The leading pre-VARA moral rights case, *Gilliam*, was brought by the creators of Monty Python television episodes that were edited for content and time to air in the United States. The plaintiffs were ultimately successful, and secured a ruling protecting the integrity of their work because they still owned the copyright to the shows. The Second Circuit held that the defendant television station could produce derivative works, or separately copyrightable works based on a pre-existing product, but that the works presented at trial did not qualify as derivative. The court concluded that “unauthorized editing of the underlying work... would constitute an infringement of the copyright in that

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60. *Id.* at 526. The court demonstrated its attitude towards moral rights by stating: “These so-called ‘moral rights,’ so we are informed, are recognized by the civil law of certain foreign countries.” *Id.*
61. *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S. 2d 813, 815 (Sup. Ct. 1949). The artist sought specific performance, hoping either that the church would remove the obliterating paint on the wall, or alternatively, that he be allowed to remove the entire fresco at the church's expense. *Id.*
62. *Id.* at 819.
63. *Id.*
65. See *id.* at 25.
66. *Id.* at 17.
67. *Id.* at 20. Examples of derivative works include “a translation, a musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted.” 17 U.S.C. § 101 (2000).
work similar to any other use of a work that exceeded the license granted by the proprietor of the copyright. 68 If the defendant received permission from the copyright owner to produce derivative works, it still would not have been permitted to change the original work. 69

C. Visual Artists Rights Act of 1990

While some efforts were made in Congress to protect an artist's moral rights before and after the adoption of the Berne Convention, 70 no real measures were adopted until 1990, when VARA was passed. 71 VARA is generally recognized as a big step towards the protection of artists' moral rights in the United States, though it does not fully comply with the Berne Convention by encompassing all literary and artistic works as required by Article 6 bis. 72 VARA covers only works of "visual art," 73 yet many works that are visual but not considered fine art are excluded from protection. 74 Also excluded from protection are works made

68. Gilliam, 538 F.2d at 21.
73. 17 U.S.C. § 101 (2000). A "work of visual art" is defined as:
   (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.
Id.
74. Id. The statute specifically excludes the following as works of visual art:
    (A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, database, electronic information
for hire and works not subject to copyright protection.\textsuperscript{75}

1. Protection of Attribution and Integrity Rights

VARA protects the moral rights of attribution and integrity belonging to the author of a work of visual art that meets the statute's requirements.\textsuperscript{76} The right of attribution allows the author to claim authorship of his or her work,\textsuperscript{77} to preclude the use of the author's name if he or she did not in fact create the work,\textsuperscript{78} and to renounce authorship of a work that has been distorted, mutilated, or modified in a manner that would prejudice the author's honor or reputation.\textsuperscript{79} The right of integrity allows the author to prevent the distortion, mutilation, or other modification of his or her work if done intentionally\textsuperscript{80} and if it would result in harm to the artist's honor or reputation.\textsuperscript{81} The moral rights for a work created after the effective date of VARA last for the author's lifetime,\textsuperscript{82} and in the case of joint authors, the rights last for the life of the last surviving author.\textsuperscript{83}

There are, however, several exceptions to the rights of attribution and integrity included in VARA, and if a work falls within one of these exceptions, it is not afforded moral rights protection.\textsuperscript{84} Modification resulting from the passage of time or from the nature of the materials used in creating the work will not qualify as a violation of the right of integrity.\textsuperscript{85}

\begin{itemize}
  \item service, electronic publication, or similar publication;
  \item (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;
  \item (iii) any portion or part of any item described in clause (i) or (ii) . . . .
\end{itemize}

\textit{Id.}

\textsuperscript{75} \textit{Id.}
\textsuperscript{76} 17 U.S.C. § 106A (2000). In the copyright context, the term “author” is a term of art used to describe the creator of any copyrighted work, including artistic works. \textit{See generally id.}
\textsuperscript{77} \textit{Id.} § 106A(a)(1)(A).
\textsuperscript{78} \textit{Id.} § 106A(a)(1)(B).
\textsuperscript{79} \textit{Id.} § 106A(a)(2).
\textsuperscript{80} \textit{Id.} § 106A(a)(3).
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} 17 U.S.C. § 106A(d).
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Id.} § 106A(c).
\textsuperscript{85} \textit{Id.} § 106A(c)(1); \textit{see also} Interview with Anthony Teixeira, Sculptor, in San Jose, Cal. (Oct. 10, 2006). If the work deteriorates because of its age, subsequent modification will not constitute a violation of the artist's moral rights. \textit{See} Interview with Anthony Teixeira, \textit{supra}. Similarly, if the work is created using certain materials, deterioration may be unavoidable. \textit{Id.} For
Similarly, acts performed during conservation or public presentation of a work are not distortions or modifications that are actionable under VARA unless the modification is the result of gross negligence. Further, the rights of attribution and integrity do not apply to reproduction, portrayal, depiction, or any other use of an otherwise protected work when used in connection with works that are specifically excluded from the statute’s definition of works of visual art.

While the moral rights of an author under VARA cannot be transferred, they can be waived by an express written waiver, which must specify the work and uses of that work that are waived. In a joint work, a single author may waive the rights of all authors.

2. Additional Limitations to VARA Application

In addition to the limitations on the types of works protected and the rights provided, VARA also contains a complex system for the removal of a work from a building, which limits the moral rights protection that will be granted to certain artists, such as muralists. This area of legislation takes into consideration the amount of potential harm to the work, notice requirements, and the nature and date of the original agreement.

VARA also contains preemption provisions similar to other federal laws requiring state laws to yield to their example, bronze sculptures will typically discolor based on the environment where they are placed. A bronze sculpture placed near the sea will often turn green because of the salt in the air, while a bronze sculpture placed in the desert may discolor based on different atmospheric conditions. Likewise, a painting placed in sunlight may fade over time.

86. 17 U.S.C. § 106A(c)(2). The lighting or placement of the work is included. If, therefore, an artist believes his work should be displayed in a particular manner and the purchaser displays it in a different manner, or with different lighting, there is no violation of the artist’s VARA rights based on the conservation and public presentation of the work. See id.

87. Id.
88. Id. § 106A(c)(3).
89. Id.
90. Id. § 106A(e)(1).
91. Id.
93. See id. § 113(d).
94. See id.
federal counterparts.\textsuperscript{95} However, any rights which are not equivalent to VARA, or that extend beyond the lifetime of the author, are not preempted.\textsuperscript{96} Therefore, protection for the artist may be strengthened or weakened based upon the location of the work and that state's applicable laws.\textsuperscript{97}

3. \textit{Available Remedies Under VARA}

While normal civil remedies for copyright infringement are available to an artist suing under VARA,\textsuperscript{98} the criminal penalties of copyright law are generally not available.\textsuperscript{99} The rights in VARA, like all rights under copyright law, are limited by the fair use doctrine, which allows for the use of copyrighted material in specific contexts, such as educational purposes.\textsuperscript{100}

4. \textit{Providing a Violation of VARA}

In order to prove a violation under VARA, the artist must first demonstrate that the work is included in one of the categories that receives protection under the statute.\textsuperscript{101} After this initial hurdle is met, the artist must prove the work is of "recognized stature."\textsuperscript{102} While the term "recognized stature"
is not defined in the statute itself, case law has created a definition which considers whether the work has merit, and whether it is recognized as being meritorious by members of society. Case law has demonstrated that the decision of whether or not to admit evidence supporting an artist's claim that his work is of recognized stature is made solely at the discretion of the judge on a case-by-case basis. This discretion may cause emerging artists to suffer due to a lack of recognized stature within the artistic community—a status that may only come years later.

III. THE UNITED STATES DOES NOT CURRENTLY COMPLY WITH THE BERNE CONVENTION

VARA did not bring the United States into full compliance with the Berne Convention, nor did it meet the international legal community's goal of protecting the moral rights of artists. Statements made by members of Congress at the time the United States joined the Berne Convention show that the majority of American lawmakers believed existing laws were sufficient to protect the moral rights of artists, and therefore no additional law was needed. VARA was enacted despite this belief, but the resulting statute is a stunted attempt to adhere to international expectations generated when the United States agreed to accept the terms of the Berne Convention.

Since its enactment in 1990, only one artist has successfully litigated a VARA lawsuit. All other artists attempting to exercise their moral rights under the protections provided by VARA have lost their suits. This surely cannot be the protection that the international community intended to implement by including Article 6 bis in the Berne Convention and requiring adherence to that modified, but not destroyed, this element need not be proven. Id.

103. See id.; see also infra Part IV.A (delineating the test and the reasoning of the court in Carter).
106. See supra notes 35-49 and accompanying text.
107. See supra Part II.A.
108. See infra Part IV.A.2. This is the only reported case that documents a success, although there may be unreported successes.
109. See infra Part IV.A.1.
section as a prerequisite of joining. Due to its numerous limitations and exceptions, VARA prevents artists from receiving protection for their moral rights, demonstrating the United States' failure to comply with the Berne Convention.

The United States is a common law country that relies primarily on the utilitarian view of copyright, instead of the natural right theory that many civil law countries employ. Because civil law countries initially developed moral rights theory and legislation, some of the difficulty in creating adequate legislation in the United States may stem from the differing views of copyright between the civil and common law countries. However, a compromise can be made that will allow the United States to continue its utilitarian tradition, while also protecting the moral rights of artists as the Berne Convention was intended to do.

IV. ANALYSIS

A. Moral Rights Cases After the Implementation of VARA

Although many cases have been decided since VARA's implementation, the majority have been resolved unfavorably for the artists. The opinions in these cases largely demonstrate the problems with the statute, and the difficulty of success under the current statutory regime. The sole published success under VARA to date is indicative of the limited moral rights protections currently afforded to artists.

1. Failures Under VARA

While cases asserting VARA claims are common, very few artists have actually succeeded on such grounds. In fact, there is only one published opinion to date where an artist was awarded damages on a VARA claim. This might be due to the inherent limitations in the VARA statute. It is

110. Despite the intentions of the international community, the United States made sure Article 6 bis would not be enforced against it if it chose not to comply with the moral rights provision. See supra note 39 and accompanying text.
111. See infra Part IV.C.
112. See infra Part V.
113. See infra Part V.
114. See Martin v. City of Indianapolis, 192 F.3d 608 (7th Cir. 1999).
easy for a particular work to fall outside the allowable protections of VARA, and therefore, not receive any rights under the statute, because of the number of restrictions within VARA. An additional reason for the lack of successful cases may be due to the historical reluctance of courts to allow protection for moral rights.

One notable failure under VARA was the case of Pollara v. Seymour, in which the court addressed the protection of a work that was primarily promotional in nature. Pollara was commissioned by the Gideon Coalition, a non-profit legal service, to create a banner for an information table. The finished banner was ten feet by thirty feet long, and depicted a group of people of different ethnicities engaged in an effort to obtain legal services. Gideon failed to obtain a permit for Pollara to install the banner in a building and to leave it overnight, and the building manager had his workers remove it. In the process of removal, the banner was torn into three parts and left crumpled in the manager’s office, giving rise to Pollara’s VARA claim.

In analyzing the claim under VARA, the Second Circuit denied Pollara protection because the work fell into one of the statutory exceptions to works of visual art. The court noted that VARA did not protect works that advertise or promote, and determined that the work in question constituted advertising material under the copyright statute, as the goal of the banner was to draw attention to Gideon. Pollara argued that although her work was commissioned by a political group, she used traditional painting materials and that the text of the banner did not detract from the artistic

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116. See supra note 74.
117. See supra Part II.B.
119. Id. at 266.
120. Id.
121. Id. at 267.
122. Id. Pollara claimed destruction of her work under VARA, and also claimed a violation of her First Amendment rights. Id. The First Amendment argument is not addressed here, as it is not probative of the result of the VARA claim. Id.
123. Id.
124. Pollara, 344 F.3d at 268-69. The statute specifically excludes “any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container” from being categorized as a work of visual art. 17 U.S.C. § 101 (2000).
merit of her work. The court rejected this argument and pointed out that while the banner was visually appealing, it was not within the realm of the court to judge artistic merit, but only to decide whether it fell within one of VARA's protected categories. Therefore, the court held that the work was inherently promotional in nature and could not be protected under VARA.

The first real substantive look at VARA occurred in *Carter v. Helmsley-Spear, Inc.*, a case involving a sculptural work installed in a building lobby. The plaintiffs entered into a contract with the managing agent of the building's tenant in December 1991 to design a sculpture for the lobby of the building. In early 1994, the tenant's lease was terminated when the leasing company filed for bankruptcy. Defendant Helmsley-Spear, Inc. became the managing agent, and barred the plaintiffs from the property shortly thereafter because it did not approve of the sculpture in the lobby.

Plaintiffs claimed a violation of VARA. The defendants responded by stating that the work could not be protected by VARA because: (1) the work was not a protected work of visual art; (2) the work was made for hire, and therefore, was not protected under the provisions of VARA; (3) there would be no damage to the plaintiffs honor or reputation if the work was distorted, mutilated, or modified; and (4) the work was not of recognized stature, and could therefore be destroyed. The court, trying the case without a jury, addressed each of the issues independently. The resulting decision contained a complete analysis of the merits of the case at hand, and also provided a step-by-step guide to analyzing a case under VARA.

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125. Pollara, 344 F.3d at 270.
126. Id. at 271; see also Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805 (2005) (discussing the role of judges in determining artistic merit).
127. Pollara, 344 F.3d at 270.
129. Id. at 312.
130. Id.
131. Id. at 313.
132. See id.
133. Id.
135. Id. at 316-17.
136. Id. at 323-24.
137. Id. at 324-26.
The defendants' first argument for excluding the work from the protections of VARA was based on the fact that the work incorporated elements of applied art. The court found that while the work had some elements and methods traditionally used to create applied art, the work as a whole was not applied art. It held that VARA did not prohibit protection for "works of visual art that incorporate[d] elements of, rather than constitute, applied art."

In determining whether the work was a work made for hire, and therefore, excluded from protection under VARA, the district court weighed the "Aymes factors" in order to determine whether the plaintiffs were employees or independent contractors. The court found that the artists had complete artistic freedom, their work required great skill, and that the defendants had the right through the contract to assign other related projects to the artists. Those factors weighed in favor of finding the artists to be independent contractors. However, the tax treatment of the artists weighed in favor of a finding that they were employees, because they were given health benefits and provided with W-2 forms. Despite the tax treatment factor, the court found the factors as a whole weighed in favor of a finding that the artists were independent contractors, and the work therefore could not be considered a work for hire.

The court next analyzed whether the work should be protected from mutilation, distortion, or modification under

138. Id. at 315. Applied art involves two-dimensional and three-dimensional "ornamentation or decoration" attached to utilitarian objects. Id. Applied art is excluded from VARA protection. See 17 U.S.C. § 101 (2000).
139. Carter, 861 F. Supp. at 315-16. In particular, the work was made out of scrap materials, including a giant hand crafted from an old school bus. Id.
140. Id. at 315-16.
141. Id. at 315.
142. See id. at 317-23. The "Aymes factors" utilized by the court to determine whether a work is made for hire are: the right to control the manner and means of production, requisite skill, provision of employee benefits, tax treatment of the hired party, and whether the hired party may be assigned additional projects. Aymes v. Bonelli, 980 F.2d 857, 860 (2d Cir. 1992).
144. Id.
145. Id. at 319.
146. Id.
147. Id. at 322. This finding was later reversed on appeal. See supra note 163 and accompanying text.
VARA.\textsuperscript{148} The statute provides the author with these rights only when the alteration of the work would be prejudicial to the author's honor or reputation.\textsuperscript{149} Because the statute did not define "prejudicial," "honor," or "reputation," the court looked to the plain meaning of the statute.\textsuperscript{150} The court interpreted the statutory language to require a determination of "whether such alteration would cause injury or damage to plaintiffs' good name, public esteem, or reputation in the artistic community."\textsuperscript{151} There was no requirement that the artist's reputation be derived independently from the work at issue; therefore, an artist's reputation could be based solely on the work at issue in the litigation.\textsuperscript{152} The court weighed the evidence and decided that the destruction of the work would damage the plaintiffs' honor and reputation.\textsuperscript{153}

Next, the court looked to whether the work was protected from destruction under VARA.\textsuperscript{154} The statute provided that a work must be of "recognized stature" to be protected from destruction, but again, this term was not defined.\textsuperscript{155} The court found that a plaintiff must satisfy a two-part test for their work to qualify as a work of recognized stature.\textsuperscript{156} The plaintiff must show: "(1) that the visual art in question has 'stature,' \textit{i.e.} is viewed as meritorious; and (2) that this stature is recognized by experts, other members of the artistic community, or by some cross-section of society."\textsuperscript{157} The court made clear that the recognized stature need not be on a level with famous artists.\textsuperscript{158} The court again sided with the plaintiff, finding that this work was one of recognized stature.\textsuperscript{159}

\begin{enumerate}
\item Id. at 323-24.
\item Id. at 324-26.
\item Id. at 324-26.
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\item Id. at 324-26.
\item Id. at 324-26.
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The court held that the plaintiffs were entitled to an injunction to prevent the distortion, mutilation, modification, or destruction of the work. Additionally, the court ruled that the work could not be removed from the building since portions of it would be destroyed if it were removed.

Despite the plaintiff's initial success, upon review by the Court of Appeals for the Second Circuit, the decision of the lower court was reversed. The Court of Appeals held, contrary to the district court's opinion, that the multiple factors weighed in favor of a finding that the sculpture constituted a work for hire, placing the artist's creation under the work for hire exception, and eliminating the protections of VARA. While the portion of the district court's decision granting the injunction was vacated, the lower court's reasoning is still applicable in analyzing the various facets of VARA protection, as the Second Circuit's holding is confined to the application of the work for hire

One of these professors, Professor Darroll, explained a specific process that he used to determine if a work has stature, and the court accepted this process and conclusion about the work without repeating the process. Id. Also called as an expert was Kent Barwick, President of the Municipal Art Society of New York, who claimed, among other things, that the work was one of the "great spaces of New York." Id. Utilizing this expert testimony, the court concluded the work was one of recognized stature. Id. at 329.

A work of visual art incorporated into a building after the effective date of VARA may not be removed if doing so would result in the "destruction, mutilation, distortion, or other modification of the work," unless such removal is agreed to in writing by the building owner and the artist. 17 U.S.C. § 113(d)(1) (2000).

See Carter, 71 F.3d at 88.

The court found the artists controlled the work's "manner and means" and that the artists also had the requisite skill and control over the work, both of which weighed against a work for hire status. Id. However, the court went on to show that the artists were routinely assigned other projects in the building, meaning they were hired to perform work other than the sculpture. Id. This weighed in favor of a finding that the artists were not independent contractors, but employees. Id. Further, the court found that the defendants paid payroll and social security taxes, provided employee benefits, and contributed to unemployment insurance on the artists' behalf. Id. Additionally, the artists filed for unemployment benefits after their positions were terminated, listing the building's management company as their former employer. Id. The artists were also provided with many of the supplies used to complete the sculpture. Id. When the court weighed all of these factors, it determined that the artists were employees. Id. at 88.
The work for hire exception, as applied in Carter, has some very real problems in practical application. Often, in order to create his or her work, an artist will be forced to sign a contract which provides that the work will be considered a work for hire. Because of this contractual language, an artist may be required to effectively give up his or her moral rights, since the contract is strong evidence that the work was made for hire and therefore exempted from protection under VARA. This exception is easily molded to fit any definition that a court chooses to apply, and can be used in many circumstances to find that the work was made by an employee, and not an independent contractor.

Phillips v. Pembroke Real Estate established a standard for the types of works protected under VARA, as well as under the Massachusetts Art Preservation Act (MAPA). In 1999, David Phillips was commissioned to create sculptures for a park in Boston. Pursuant to two written agreements, Phillips created fifteen abstract sculptures and twelve realistic marine-themed bronze sculptures of animals including crabs, shrimps, and frogs. Additionally, Phillips created paths connecting the sculptures using granite, and worked with stonemasons to create “Chords,” a large, abstract sculpture that was the centerpiece of the park.

In 2001, Pembroke Real Estate hired another landscape artist to re-design the park based on perceived conceptual problems with the park. Phillips sought a temporary restraining order to prevent the removal and relocation of his

165. See id.
166. Interview with M.J. Bogatin, Visual Artists Rights Attorney, Bogatin, Corman & Gold, in Oakland, Cal. (Jan. 10, 2006).
168. Id. at 96-103; see also Massachusetts Art Preservation Act, ch. 488, § 1, 1984 Stat. (codified at MASS. GEN. LAWS ANN. ch. 231, § 85S (West Supp. 1993)).
170. Id.
171. Id. at 93-94.
172. Id. at 94. Specifically, Pembroke wanted more plants for shade and simplified walkways. It additionally wanted to replace the river rock, which turned out to be a maintenance problem. Id.
sculptures. He claimed that his sculptures and stonework were site-specific, and that they collectively formed one work of visual art that should be protected under VARA, or alternatively, under the similar Massachusetts statute, MAPA.

The Massachusetts district court engaged in a thorough analysis of the provisions of VARA, and denied Phillips any sort of protection because the work as a whole did not fall within one of the definitions of visual art set forth in the copyright statute. The district court rejected the idea that the works were all integrated. Instead, the court reasoned that the marine sculptures might qualify as a single work because of the integrated marine theme and recurring spirals of those specific sculptures, as well as the use of marine granite boulders and pavers. The court found, however, that the remaining sculptures, including the “whimsical sea creatures” that were not a part of the northwest to southwest axis of the park, were individual pieces. The court held that VARA may protect site-specific art, but the works in question fell under the public presentation exception in VARA, and therefore, Pembroke had a right to move the sculptures at any time.

The court construed protection under VARA narrowly, reasoning that since some of the works were created not by Phillips himself, but merely under his direction, the pieces

173. Id. at 95.
174. See id. The artist claimed that his work was created for a specific site, and to take the work out of the site would be to destroy its meaning by taking it out of context. Id.
176. Id. at 96-100.
177. Id. at 98-99. For a full list of works protected under VARA, see supra note 73.
179. Id.
180. Id. at 98. The court decided that some of the sculptures matched the idea of an integrated theme—namely, the sea creatures. Id. However, it decided that the remaining sculptures did not fit with an overall theme. Id. at 98-99. Because of this, the entire park, with all of its works, could not be considered one complete work. Id. This is how the court was able to deny protection in this case to individual works, since they were not all part of one theme. Id. at 98.
181. Id. at 99-100.
182. Id. at 99.
183. Id.
could not be seen as a unitary whole.\textsuperscript{184} However, the court failed to understand the industry standard regarding art assistants. It is customary in the art world for a well-known, highly respected artist like Phillips to hire associate artists to complete much of the physical labor that goes into the resulting piece of art.\textsuperscript{185} The artist himself creates the concept and initial production ideas, assists throughout the process, and maintains the artistic credit for the work.\textsuperscript{186} The Massachusetts court that heard Phillips’s case, however, did not understand this commonly practiced methodology, and consequently issued a holding which ultimately harmed Phillips. Since Phillips did not individually create each specific piece in the park, the court felt justified in applying the defendant’s proffered exception.\textsuperscript{187}

Under MAPA, the definition of visual art is broader than under VARA;\textsuperscript{188} therefore the court held that the state law was not preempted by VARA.\textsuperscript{189} The district court concluded that the requirements under MAPA were satisfied, and that the site-specific work was a work of recognized quality.\textsuperscript{190} It further found that Phillips was an artist of international reputation and had won numerous commissions, been exhibited in galleries, and featured in art magazines based on his site-specific work.\textsuperscript{191} The district court held that the removal or destruction of Phillips’ work would necessarily damage his reputation as an artist, and was therefore prohibited under MAPA.\textsuperscript{192}

\textsuperscript{184} Phillips, 288 F. Supp. 2d at 99.
\textsuperscript{185} Interview with David Middlebrook, public artist and sculptor, in Los Altos, Cal. (Apr. 14, 2006).
\textsuperscript{186} Id.
\textsuperscript{187} Phillips, 288 F. Supp. 2d at 99-100.
\textsuperscript{188} Id. at 100-01. The definition of visual art is much broader in MAPA than in VARA. Id. In particular, MAPA’s “fine art” definition is more expansive than the “visual art” defined in VARA, and includes art forms not covered by VARA, such as holograms, videotapes, audiotapes, and films. Id. Under the broader MAPA definition, the court held that the park could be considered a work of fine art, even though a park does not meet the definitions of visual art under VARA. Id.
\textsuperscript{189} Id. Because the preemption statute in copyright law only applies if the protections offered under the state statute are the same as those offered under the copyright provisions, MAPA is not preempted by VARA since the statutory definitions of protected works are different. Id.
\textsuperscript{190} See id. at 101-03.
\textsuperscript{191} Id. at 103.
\textsuperscript{192} Id. at 104.
**Phillips** was recently reviewed by the First Circuit Court of Appeals,¹⁹³ which affirmed the decision of the district court on different grounds.¹⁹⁴ The court of appeals declared that site-specific art is not included in VARA, and is therefore, contrary to the district court's conclusion, unprotected under federal law.¹⁹⁵ The court drew upon the plain language of VARA in determining that site-specific art is not protected, because the phrase "site-specific" is not included anywhere in the statute.¹⁹⁶ The first district indicated that in order for site-specific work to be protected under VARA, not only would the phrase itself need to be included, but the statute would also have to include an "elaboration of how to differentiate between site-specific and non-site-specific art."¹⁹⁷ The dichotomy introduced by the district court—that VARA protects site-specific art and then permits its destruction or removal through the public presentation exception—was overruled by the court of appeals, which held instead that VARA does not protect site-specific work at all.¹⁹⁸

The lower court in **Phillips** allowed the application of the public presentation exception because it concluded that the work was not a single piece of art, due to Phillips' use of assistants.¹⁹⁹ Despite a strikingly similar factual scenario, the Second Circuit Court of Appeals reached the opposite conclusion in **Carter**.²⁰⁰ There, the court found that the artists used assistants in creating the works, but that the use of assistants was immaterial to their status as the artists and

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¹⁹⁴. *Id.* at 129.
¹⁹⁵. *Id.* at 140 ("By concluding that VARA applies to site-specific art and then allowing the removal of site-specific art pursuant to the public presentation exception, the district court purports to protect site-specific art under VARA's general provisions, and then permit its destruction by the application of one of VARA's exceptions. To us, this is not a sensible reading of VARA's plain meaning. Either VARA recognizes site-specific art and protects it, or it does not recognize site-specific art at all.").
¹⁹⁶. *Id.* at 143.
¹⁹⁷. *Id.* at 142.
¹⁹⁸. *Id.* at 143. The court left room for future protection of site-specific art by Congress, stating: "If such protection is necessary, Congress should do the job. We cannot do it by rewriting the statute in the guise of statutory interpretation." *Id.*
creators of the work.\textsuperscript{201} The court stated that the 
"[a]ppellants’ contention that the plaintiffs’ reliance on assistants in some way mitigates the skill required for this work is meritless, particularly because each of the plaintiffs is a professional sculptor and the parties stipulated that professional sculpting is a highly skilled occupation."\textsuperscript{202} This dichotomy in reasoning is an example of the problem with varying standards in the application of moral rights legislation.

2. Success Under VARA

In \textit{Martin v. City of Indianapolis},\textsuperscript{203} the first published successful protection of an artist’s moral rights under VARA, the Seventh Circuit clearly defined the necessary elements of a successful VARA claim. In the case, Martin, the plaintiff, was a sculptor who had been contracted to erect a twenty-by-forty foot metal sculpture on land owned by John LaFollette, the chairman of the company that hired Martin to create the sculpture.\textsuperscript{204} LaFollette’s company agreed to furnish the materials for the sculpture,\textsuperscript{205} and the parties contracted that if the land was sold or determined to be unfit for the sculpture at any time in the future, LaFollette and Martin would be given written notice giving them ninety days to remove the sculpture.\textsuperscript{206}

Six years after the completion of the sculpture,\textsuperscript{207} the city notified LaFollette that there would be hearings held on the acquisition of the land.\textsuperscript{208} Kim Martin, the artist’s brother and president of the company that hired Martin, reminded the city that the company paid for the sculpture and signed

\begin{itemize}
  \item \textsuperscript{201} \textit{See id.} at 86.
  \item \textsuperscript{202} \textit{Id.}
  \item \textsuperscript{203} \textit{Martin v. City of Indianapolis}, 192 F.3d 608 (1999).
  \item \textsuperscript{204} \textit{Id.} at 610.
  \item \textsuperscript{205} \textit{Id.}
  \item \textsuperscript{206} \textit{Id.} The agreement provided:
  Should a determination be made by the Department of Metropolitan Development that the subject sculpture is no longer compatible with the existing land use or that the acquisition of the property is necessary, the owner of the land and the owner of the sculpture will receive written notice signed by the Director of the Department of Metropolitan Development giving the owners of the land and sculpture ninety (90) days to remove said sculpture.
  \textit{Id.}
  \item \textsuperscript{207} \textit{Id.} at 611.
  \item \textsuperscript{208} \textit{Id.} at 610.
\end{itemize}
an agreement with the Department of Metropolitan Development regarding the possible removal of the sculpture.\textsuperscript{209} The company was willing to donate the sculpture to the city if the city bore the costs of removal, as long as the artist had some input as to the new location of the piece.\textsuperscript{210} The city purchased the land,\textsuperscript{211} and despite plaintiff's repeated proposals,\textsuperscript{212} demolished the sculpture without notice to either the artist or company.\textsuperscript{213}

Martin claimed a violation of his rights under VARA.\textsuperscript{214} The court analyzed the subject of "recognized stature" using the analysis of the court in Carter as a model.\textsuperscript{215} The court analyzed the evidence Martin presented to determine that the work was of recognized stature,\textsuperscript{216} and ultimately decided that the destruction of Martin's sculpture was a violation of his rights under VARA.\textsuperscript{217} Martin's sculpture fit all the requirements of VARA,\textsuperscript{218} and there was no valid waiver of his rights.\textsuperscript{219} The court found the city to be at fault for

\begin{itemize}
\item \textsuperscript{209} Martin, 192 F.3d at 611.
\item \textsuperscript{210} Id.
\item \textsuperscript{211} Id.
\item \textsuperscript{212} Id.
\item \textsuperscript{213} Id. The company made repeated efforts to contact the mayor, and other city officials. Id. The artist himself repeated the proposal to move the piece at the hearings, and wrote a letter to the mayor reiterating this proposal. Id. Each time the proposal was mentioned, the contract was also mentioned, clarifying a 90-day notice requirement. Id. Despite these efforts, the sculpture was demolished, leaving the court to claim, "[b]ureaucratic ineptitude may be the only explanation." See id. at 614.
\item \textsuperscript{214} Id. at 610. The original lawsuit resulted in summary judgment for the plaintiff, however, neither party was satisfied with this decision, and both appealed. Id.
\item \textsuperscript{215} Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 325 (S.D.N.Y. 1994). The two-part analysis consisted of the following determinations: "(1) that the visual art in question has 'stature,' i.e. is viewed as meritorious, and (2) that this stature is 'recognized' by art experts, other members of the artistic community, or by some cross-section of society." Id.
\item \textsuperscript{216} See Martin, 192 F.3d at 612. Martin produced newspaper and magazine articles, a letter from a gallery director, and a program from a show where the sculpture won "Best in Show." Id.
\item \textsuperscript{217} Id.
\item \textsuperscript{218} See id.
\item \textsuperscript{219} Id. at 614 ("Under 17 U.S.C. § 106A(e)(1), an artist may waive VARA rights 'in a written instrument signed by the author,' specifying to what the waiver applies. There is no written waiver instrument in this case which falls within the VARA requirements. We regard this argument to be without merit.").
\end{itemize}
destroying the work without giving Martin adequate notice.\textsuperscript{220} However, it also found that the city's actions did not constitute "willful" conduct under VARA, so the plaintiff was not entitled to enhanced damages.\textsuperscript{221} Despite the damages portion of the opinion, \textit{Martin} remains a strong case in support of moral rights legislation.

\textbf{B. Further Problems with Undefined Terms in VARA}

VARA allows an artist the right to prevent any distortion, mutilation or modification of his or her art that would be "prejudicial to his or her honor or reputation."\textsuperscript{222} Congress's failure to create a clear definition of these terms has led the courts to use the generally accepted dictionary definitions of these terms, with the term "prejudicial" typically meaning "harmful."\textsuperscript{223} Because of the confusion as to what these terms actually mean, different courts may create different holdings for the same factual situation, which may cause an artist to lose protection.

Additionally, VARA does not define the term "recognized stature."\textsuperscript{224} Because an author can only prevent the destruction of a work of recognized stature, this term is vital to the level of protection an author may receive under VARA. The best definition of this term to date is the two-part test the court enumerated in \textit{Carter}.\textsuperscript{225}

\textbf{C. Varying Standards Surrounding Copyright Protection}

Part of the problem in awarding moral rights to a claimant under VARA is the dichotomy between moral rights as viewed in America and abroad. The international standard is largely focused on protecting all moral rights of

\begin{itemize}
\item \textsuperscript{220} \textit{Id.} at 614.
\item \textsuperscript{221} \textit{Id.} ("In spite of the City's conduct resulting in the intentional destruction of the sculpture, we do not believe under all the circumstances . . . that the City's conduct was 'willful' as used in VARA . . . so as to entitle the plaintiff to enhanced damages."). Even in the plaintiff's victory, the Seventh Circuit belittled the destruction of the sculpture. \textit{See id.} The traditional view of courts not awarding artists moral rights is perpetuated even in this successful decision. \textit{See id.}
\item \textsuperscript{223} \textit{See} \textit{Carter} v. \textit{Helmsley-Spear, Inc.}, 861 F. Supp. 303, 323 (S.D.N.Y. 1994).
\item \textsuperscript{224} 17 U.S.C. § 106A(a)(3)(B).
\item \textsuperscript{225} \textit{See supra} notes 156-58 and accompanying text.
\end{itemize}
an artist\textsuperscript{226} to the exclusion of the rights of anyone else. Contrastingly, the American standard still demonstrates great reluctance in awarding protection to artists, even after the passage of VARA\textsuperscript{227}. This disparity might be attributable, in part, to the differing belief systems and valuations of art in various societies.

1. **International Perspective**

Most European countries believe in the natural rights rhetoric of copyright\textsuperscript{228}. This theory dictates that an author has the right to reap the fruits of his creations,\textsuperscript{229} obtain rewards for his contributions to society,\textsuperscript{230} and protect the integrity of his creations as extensions of his personality.\textsuperscript{231} This final phrase precisely encompasses the concept of moral rights.\textsuperscript{232} If an author has an inherent right to protect the integrity of his creations, and if every work is an extension of that artist's personality, then the work should be awarded the rights of attribution and integrity, which form the foundation for moral rights protection. This view is prominent in many countries across the globe,\textsuperscript{233} and does not apply only to moral rights, but to copyright protection as a whole.\textsuperscript{234} These international forums were the pioneers of moral rights legislation, and retain the highest protection for authors and artists.\textsuperscript{235}

2. **Domestic Perspective**

In contrast to the international view, the American view has primarily been one of utilitarianism,\textsuperscript{236} a theory based

\begin{quote}
\textsuperscript{227} See supra Part IV.A.1.
\textsuperscript{228} See JOYCE ET AL., supra note 226, at 59.
\textsuperscript{229} Id.
\textsuperscript{230} Id.
\textsuperscript{231} Id.
\textsuperscript{232} Id. Moral rights were designed to protect the integrity of an artist's creations, as defined in the natural rights theory of copyright. Id.
\textsuperscript{233} See infra Parts IV.D-E.
\textsuperscript{234} See JOYCE ET AL., supra note 226, at 60-61.
\textsuperscript{235} See supra note 25. This was part of the impetus behind the implementation of the Berne Convention and particularly Article 6 bis. Id. The international community wanted to protect the artists and their works. Id.
\textsuperscript{236} See JOYCE ET AL., supra note 226, at 56-57.
\end{quote}
largely on economics. The basic premise of utilitarianism is that an artist needs financial incentives to bring his work to market. If an artist is not provided with these incentives, often in the form of legal protection, he might not produce as much art, which would be detrimental to society as a whole. Because of this approach, American theory has always been an economic trade-off between encouraging production of works through legal incentives and restricting their scope through limiting doctrines, such as the doctrines of originality and fair use. This view does not allow much room for the protection of an artist's moral rights. The main goal of utilitarianism, and to a large extent, of American copyright law, has been to encourage the creation and dissemination of artistic works to the marketplace. While this goal is aided by legal protections, such protections are only strong enough to encourage creation, due to the limits placed on the amount of rights an artist can actually claim.

The law in the United States has always been structured to give artists very limited working room. The structure allows an artist just enough incentive to create, but prevents him or her from having enough rights to create a monopoly in his or her works. Because of this viewpoint, courts have not truly protected moral rights. Even after the implementation of VARA, courts have been uninterested in recognizing and applying moral rights.

D. Dualistic v. Monistic Approach to Moral Rights

Moral rights legislation and protection first began in

237. Id. at 57.
238. Id.
239. Id.
240. Id. at 58. The originality requirement has been found to be a constitutional requirement. Id. at 85. It states all that is necessary for a work to be copyrightable is for the work to have been originally created by the author, and have a minimal degree of creativity. Feist Publ'n, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).
241. See JOYCE ET AL., supra note 226, at 58. For the full list of exceptions to violations of copyright, see 17 U.S.C. §§ 107-122.
242. See JOYCE ET AL., supra note 226, at 58.
243. Id.
244. Id.
245. See supra Part II.B.
246. See supra Part IV.A.
Europe. The originator of moral rights, France, has well-established legislation on the subject, which can assist countries like the United States in analyzing their own moral rights legislation, and serve as a check on their compliance with the Berne Convention as well as other international standards of protection. Many European countries have a long-standing tradition of protecting the moral rights of artists, and the similarities and differences among their laws are also instructive. In the countries that originated moral rights protection, there are generally two separate views of the protection, dualism and monism.

1. Dualism

The dualistic perspective on moral rights is best exemplified by the French Copyright Code. This view of moral rights revolves around the fact that there are two elements of copyright protection: the rights to the intellectual and moral nature of the work, and the economic rights as determined by law. From this perspective, an artist's moral rights in a work are seen as separate from his or her economic rights in the same work. This dualistic approach greatly changes the way an artist can waive his or her rights in a work, the damages he or she may receive for injury to his or her work, and how he or she may transfer his or her rights through succession. Specifically, the French theory provides two types of copyright protection: the moral rights are considered "perpetual, inalienable, and imprescriptible" under French law, while the other rights are considered limited in time, alienable, and subject to prescription.

Another important issue internationally is the potential
succession of moral rights. In dualistic countries, the legal successors of the author must enforce the moral rights of the author. 255 This right is considered a functional right only, and the successors cannot exercise it in their own personal interests, but only to protect the work and person of the author. 256 The successors are made de facto conservators of the moral rights of the author, but if they do not fulfill their duties on behalf of the author, judicial intervention is often permitted. 257

2. Monism

Monism, in contrast, is the view that copyright as a whole protects the intellectual, moral and economic rights of artists. 258 Germany best exemplifies this view by stating in its copyright code that copyright "shall protect the author with respect to his intellectual and personal relationship with his work, and also with respect to utilization of his work." 259 The monistic view would therefore view the moral right as one right of many the author receives in copyright. 260

Monistic countries typically allow for the succession of moral rights only by testamentary disposition, and not by absolute right. 261 The entire copyright, including its economic and moral rights, is passed to successors due to the monistic view that a copyright is a single thing, and does not include separate rights at all. 262 In addition, the legal successors are able to exercise the moral rights protection as they see fit, even if doing so is in their own interests. 263 Of course, the successors will usually act in the best interests of the author.

255. See Dietz, supra note 29, at 217. This right exists in France, Belgium, Italy, and Spain. Id.
256. Id.
257. Id.; see also French Copyright Act, supra note 249, at art. L.121-3 (authorizing the court to issue orders in cases of manifest abuse in the exercise or non-exercise of the right of disclosure by a deceased author's representatives and permitting the government to refer cases to the courts).
258. See Dietz, supra note 29, at 207.
260. See Dietz, supra note 29, at 208-09.
261. See id. at 218.
262. See supra notes 259-60 and accompanying text.
263. See Dietz, supra note 29, at 218.
but in monistic countries, there is simply no check against this power in striking contrast to the judicial intervention present in dualistic countries.

E. Additional Rights Protected Internationally

The international community generally protects more rights than merely those of attribution and integrity, as provided by the Berne Convention and by VARA. Moral rights in the international arena will typically cover the rights of attribution, integrity, divulgation, and the right to repent.

Divulgation is a moral right which reserves to the author the fundamental decision of when and how to release his work from the private sphere, and expose it to the public. This right, present in France, Spain, and Switzerland among other countries, allows the author the absolute discretion to decide when his work will enter the financial or commercial sphere of the public.

The right to repent or withdraw is the natural corollary to the divulgation right. This right allows the author to withdraw his work from the public sphere whenever he chooses. While this right is less developed internationally, and there is little case law on the subject, it is present in France, Germany, Italy, Spain, and Belgium. There is criticism surrounding the right to repent, since an author who changes his convictions can simply state his new convictions in a new work or in a public statement. However, there are potentially extreme situations that may justify repentance, such as where an author's social, political, or even physical existence is at stake. In the event an author wishes to invoke his right to repent, there are strict consequences for the allowance of a removal of the work from the public

264. See supra text accompanying note 33.
265. See generally Dietz, supra note 29.
266. See id. at 204.
267. See id. at 203-04.
268. See id. at 205.
269. Id.
270. Id. Currently, the right is only believed to exist in Belgium, which traditionally adheres to French copyright practices. Id.
271. Dietz, supra note 29, at 205.
272. Id.
thus, the right is seldom invoked internationally.

V. PROPOSAL

The United States claims to be in compliance with the Berne Convention and with international standards of moral rights protection, but case law demonstrates that VARA is inadequate in this regard. For the United States to fully comply with the Berne Convention and the international standards it stands for, the moral rights legislation in the United States must be aligned with that of countries with well-developed moral rights protection. By amending VARA to include key provisions of successful international moral rights legislation, the United States will be closer to international standards, and American artists will be better protected.

Many of the countries with established moral rights legislation are civil law countries, which the United States should emulate in redrafting moral rights protection for American artists. The differences between a common law country, like the United States, and a civil law country are largely those of viewpoint—natural right vs. utilitarian theories. There is sufficient room in American copyright law for the United States to adopt some of the civil law legislation on moral rights, and adapt it if necessary.

The United States should follow the dualistic viewpoint of moral rights legislation as pioneered by France, and not necessarily the monistic viewpoint preferred by Germany and others. The dualist view is much more aligned with the United States’ current system of copyrights, allowing for a far more fluid adaptation than would be possible under a monistic view. The dualistic perspective that copyright contains protections for two separate rights—economic rights on the one hand and moral rights on the other hand—fits in much more neatly with our history of protecting only

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273. See id. Dietz mentions only one consequence in particular—the obligation to compensate the relevant work users in advance. Id. This consequence of invoking the right to repent is present in France, Germany, Italy, and Spain. Id.
274. See supra Part IV.A.
275. See supra Part IV.C.
276. See supra Part IV.D.
economic rights in the United States. Since moral rights were not protected in the United States at all until VARA was passed in 1990, it would be difficult to force our society to conform to a monistic view that copyright is one system, encompassing all rights, economic and moral.

A. Additional Rights Should Be Added to VARA

The additional rights of divulgation and the right of repent or withdrawal are prevalent in the international community. Adding the protection of these rights to the American copyright system will further advance our utilitarian goals. The current perspective in America is that copyright is designed to encourage creation, and to encourage the dissemination of works to the public. These rights will help authors create because their works will be better protected, giving them additional incentive to place their works in the public market. If an author had the right to say when his or her work would enter the commercial world, he or she would more likely create at a time that is good for both him or her and the public at large. For example, if authors choose to disseminate their work at a time when the public is demanding that particular form of art, they will likely sell more, earning more income while simultaneously satisfying the economic demand.

Germany can be viewed as a test market for the divulgation right, because currently, it is automatically granted to foreign authors in Germany, regardless of their rights under German law. Therefore, an American author can fight against an illicit publication of his work in Germany, even if he does not have standing to defend his rights under any other agreement or German copyright law. While the United States is unlikely to extend the divulgation right to foreign authors until its effectiveness has been evaluated with our own copyright holders, the German

277. See supra Part II.B.
278. See supra Part IV.E.
279. See supra Part IV.C.
280. German Copyright Act, supra note 259, at art. 121(6) (“Foreign nationals shall enjoy protection under Articles 12 to 14 [moral rights provisions] with respect to all of their works, even if the conditions [relating to reciprocity and treaty rights] contained in paragraphs (1) to (5) are not fulfilled.”).
281. Id.
application of the law will allow American lawmakers to see the benefits of protecting the divulgation right.

The right to repent is less important for American copyright law because, due to a lack of pertinent case law on the subject, it has not proven to be a very important right in the international community.\textsuperscript{282} However, it is a natural corollary to the divulgation right,\textsuperscript{283} and should the United States add the divulgation right to its moral rights protection, the right to repent should be adopted as well. Additionally, many foreign nations have requirements for invoking the right to repent.\textsuperscript{284} If American legislators are concerned that adding the right to repent to the current moral rights protection will encourage authors to remove works from the marketplace, they can adopt a similar requirement to prevent unnecessary invocations of the right.

\textbf{B. Time Limit on Moral Rights}

While there is much to learn from the international community on this subject, one standard that America should not follow is the time limit on moral rights. VARA provides that depending on the date of creation, the moral rights of an artist will end when his or her copyright in the work ends, or upon the artist's death.\textsuperscript{285} While this is the predominant view in monistic countries,\textsuperscript{286} in dualistic countries, moral rights are often declared perpetual.\textsuperscript{287} France declares this perpetual right to be in accordance with the fundamental concept of moral rights in French law, even if other solutions, such as a defined end to moral rights, are available or conceivable.\textsuperscript{288} According to the French, the link between an author and his or her work exists as long as the work is capable of being communicated to the public—therefore, the personality of the author lives as long as the work exists.\textsuperscript{289}

\textsuperscript{282} See supra note 269 and accompanying text.
\textsuperscript{283} See supra Part IV.E.
\textsuperscript{284} See supra note 273.
\textsuperscript{286} See Dietz, supra note 29, at 213-16. This is also the minimum term required by the Berne Convention. That standard requires the moral rights to follow the economic rights of the author, whereas in the U.S., moral rights die with the author. See Berne Convention supra note 7.
\textsuperscript{287} See Dietz, supra note 29, at 213-16.
\textsuperscript{288} Id. at 213.
\textsuperscript{289} Id.
America does not have to allow for perpetual protection of moral rights simply to follow the dualistic view. There is no corollary between dualism and perpetuity, or monism and limited-in-time protection. Each country that has established a time limit has done so based on its individual needs and concerns, as well as each individual country’s culture. The United States is much better off with a limited time approach, such as the one contained in VARA, because it fits in with our culture and history of copyright. The utilitarian viewpoint focuses more on the expansion of American copyright and the public benefits of increased knowledge and artistic works. Given its history of failing to protect moral rights, the United States would likely balk at any attempt to increase moral rights protection beyond that which is presently afforded economic rights in a particular copyrighted work.

C. Succession of Moral Rights

An important issue in international copyright legislation is the succession of moral rights. The United States does not currently have any rules regarding the succession of moral rights. Due to the lack of any rule in this area, the United States should once again take its cue from civil law countries in creating its own legislation.

The United States should follow the monistic view in this area and allow succession by testamentary disposition instead of by absolute right. The United States places a high value on personal property, as demonstrated by the rigid probate system in American courts, and it is unlikely that the United States will allow a right such as the moral right of an author to be inherited without express testamentary disposition. Once the successors are in control of the moral right, the United States will also prefer to allow them to exercise that right on their own, without judicial intervention or control. If adopted, this hands-off approach of American jurisprudence will lead to a smoother transition for both

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290. Id. at 214.
291. Id. at 216.
293. See Dietz, supra note 29, at 217.
294. See supra Part IV.D.2.
courts and copyright owners.

D. Waiving Moral Rights

In the United States, artists may waive their moral rights to a work, and that waiver is considered binding.\textsuperscript{296} Often, artists lack the bargaining power to change this, resulting in artists not receiving their moral rights when they should.\textsuperscript{297} The United States should follow the international solution for allowing waiver in limited circumstances so as to provide the strongest possible moral rights protection. There is no uniform provision in international law for waiving the right of attribution.\textsuperscript{298} The Netherlands never allows a waiver of this right,\textsuperscript{299} whereas Denmark, Switzerland, and Germany allow waiver only in certain circumstances.\textsuperscript{300} While the United States should develop its own provision regarding the waiver of the attribution right, initially, it should follow the example set forth in Denmark, Switzerland, and Germany, allowing waiver only under specified circumstances. A balancing test is a good way for legislators, the judiciary, and artists themselves to determine when a waiver will be effective. This system would allow the United States to enact some form of waiver protection that is in between the harsh no-waiver rule of the Netherlands, and the current rule in the United States that waiver is always effective.

Waiver of the integrity right also varies based on the country of copyright. France, Italy, and Spain all agree there can be no waiver of this right, regardless of the conditions involved,\textsuperscript{301} while in the United States, there must be prejudice to the author's name or reputation for the integrity right to attach.\textsuperscript{302} While France criticizes the American approach as being too narrow, it conforms with the language contained in the Berne Convention.\textsuperscript{303}

\begin{itemize}
  \item \textsuperscript{296} 17 U.S.C. § 106A(e)(1).
  \item \textsuperscript{297} See supra note 166 and accompanying text.
  \item \textsuperscript{298} See Dietz, supra note 29, at 219.
  \item \textsuperscript{299} Id. at 220.
  \item \textsuperscript{300} Id. Waiver may be permitted in circumstances where certain requirements of proper usage are met, or by balancing the interests between the artist, the person who secured the waiver, and the public. Id.
  \item \textsuperscript{301} Id. at 221.
  \item \textsuperscript{302} 17 U.S.C. § 106A(a)(3) (2000).
  \item \textsuperscript{303} See supra note 27 and accompanying text.
\end{itemize}
E. Solution of Undefined Terms

In the United States, VARA, protects of moral rights only if the modification or destruction prejudices an artist's honor or reputation. VARA also states that an artist can only prevent the destruction to a work of recognized stature. These terms have not been defined by Congress, leaving the courts to interpret them. While these provisions of VARA may technically be in compliance with the Berne Convention, the United States should amend its moral rights legislation, eliminate these terms from VARA, and move closer to international standards.

Modification of an artist's work can conflict with his or her fundamental artistic and moral convictions without, judging from the outside, prejudicing his honor or reputation. Germany and Spain allow for protection when there is prejudice to any interest under copyright, including moral rights. This is a much better standard for protection of the artist, and the United States should adopt a similar approach, where the artist will be compensated regardless of whether the moral rights violation actually prejudices his reputation or honor. It is similarly inappropriate to require the work to be of recognized stature before it is given moral rights protection. Much art, especially that created by young artists, has not had the necessary time or exposure to become a piece of recognized stature. The elimination of this term will allow all artists to be protected in the United States as in the international community.

F. Narrowing the Public Presentation Exception

The public presentation exception in VARA is currently too broad and allows for too much damage to be done to the artist's work before a court will protect that artist's moral rights. One commentator has suggested a solution under which changes or modifications to a work that are purely artistic or aesthetic would not be allowed, whereas changes

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305. Id. § 106A(a)(3)(B).
306. See supra Part IV.B.
307. See Dietz, supra note 29, at 222.
that must be made due to technical, financial, or circumstantial conditions of exploiting the work would be permitted. By implementing this solution into American legislation, a gallery may change the frame or lighting around a painting as they have always done. However, they would be unable to remove works that were created around a theme, as the defendants did in Phillips.

G. Balancing Test to Determine the Extent of Protection

One final change to American moral rights legislation would be to adopt a more flexible approach based on balancing needs, such as the one practiced in the international community. The United States already employs fair use as a defense to copyright infringement. A similar analysis can be applied to determine the extent of moral rights protection, especially that of the integrity right. By implementing a balancing test, no single criterion, such as the employment relationship, would be decisive in an isolated manner. Currently, the United States applies a work-for-hire exception, which often denies artists' moral rights protection for their work in an employment setting. Alternatively, a balancing test, would allow the artist to enforce moral rights when violations of their personal rights are at issue. This is a form of protection the United States should provide to all of its artists.

309. Dietz, supra note 29, at 223.
310. See supra Part IV.A.1.
312. See Dietz, supra note 29, at 225. A suggested test, following the fair use analysis, would contain the following criteria:

[T]he nature and intensity of modifications of or other interference with the work, as well as its reversible or irreversible character; the number of people or the size of the public addressed by the use of the infringing work; whether the author created the work in an employment relationship or as a self-employed author, or whether a commissioning party had or had not decisive influence onto the final result of the creation; and the possible consequences for the professional life of the author, and, of course, his honor and reputation.

Id.

313. See Carter v. Helmsley-Spears, Inc., 71 F.3d 77 (2d Cir. 1995); see also supra Part IV.A.1.
314. See Carter, 71 F.3d at 85; see also supra Part IV.A.1.
VI. CONCLUSION

The Visual Artists Rights Act is a great step in the right direction for the protection of moral rights in America. However, this legislation does not meet the international standards that led to the enactment of the Berne Convention. By making a few simple changes to VARA, the United States can move closer to compliance not only with the Berne Convention, but also with the international standards that artists have come to expect. The art in America is just as valuable as art abroad. It is created by artists who are just as talented and just as passionate. American art provides the same value to society, and evokes the same emotions in the people who view it, while fetching just as much on the open market as international art. It is time we treated it just as well.